91-265

No. 91-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

POTOMAC EDISON COMPANY,
Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK,
and CARL BELT, INC.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the trial of this personal injury action a jury determined that petitioner was only 40% responsible for injuries sustained by the plaintiff, while respondent Carl Belt, Inc. (plaintiff's employer) was 60% responsible for those injuries. Nonetheless, under West Virginia's bizarre system of comparative negligence, coupled with joint and several liability, and immunity for workers' compensation employers from third-party contribution claims, petitioner was saddled with all of the plaintiff's damages, without any recourse against the employer and without any credit for the plaintiff's receipt of workers' compensation benefits. The question presented is whether this aspect of West Virginia's system of tort liability is arbitrary and irrational, in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses, as other state courts of last resort have held.

LIST OF PARTIES AND RULE 29.1 LIST

With the exception noted below,* the parties in the Supreme Court of Appeals of West Virginia are those parties listed in the caption of this Petition. Because of the potential applicability of 28 U.S.C. § 2403(b) to this Petition, copies have been served upon the Attorney General of West Virginia. Supreme Court Rule 29.4(c).

Petitioner Potomac Edison Company is a wholly-owned subsidiary of Allegheny Power System, Inc. Potomac Edison Company has two subsidiaries that are not wholly owned by it: Allegheny Generating Company and Allegheny Pittsburgh Coal Company.

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* Hester Industries, Inc. was a defendant in the trial court and an appellee in the West Virginia Supreme Court of Appeals. Petitioner believes that Hester Industries, Inc. has no interest in the outcome of this Petition, and a notice to that effect is being filed and served with this Petition as required by Supreme Court Rule 12.4.

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Petitioner Potomac Edison Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia, entered in this matter on June 27, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is not yet reported, but is reprinted in Appendix A, at 1a-19a. The Jury Order of the Circuit Court for Hardy County, West Virginia, incorporating the jury's verdict, was entered on July 26, 1989, and is

reprinted in Appendix B, at 20a-23a. The judgment against petitioner was amended to include prejudgment interest in an Order entered on August 16, 1989, reprinted in Appendix C, at 24a-25a. The Circuit Court denied petitioner's motions for a new trial and to amend or set aside the judgment in an Order entered on October 6, 1989, reprinted in Appendix D, at 26a-27a. The Circuit Court denied additional post-trial motions in an Order entered on May 15, 1990, reprinted in Appendix E, at 28a-29a.

JURISDICTION

The Judgment of the Supreme Court of Appeals of West Virginia was entered on June 27, 1991. This Petition is filed within ninety days of the entry of that Judgment, and is timely pursuant to Supreme Court Rule 13.4.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" The Equal Protection Clause of the Fourteenth Amendment provides in pertinent part: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

The provision of the West Virginia Workers Compensation Act, which has been read to immunize contributing employers from liability, not only to their injured employees, but also to claims for contribution filed by third parties who are sued by those employees, is West Virginia Code § 23-2-6. That provision is reprinted verbatim in Appendix F, at 30a.

STATEMENT OF THE CASE

Petitioner Potomac Edison Company is an electric utility that provides service in western Maryland and certain portions of Virginia and West Virginia. One of its industrial customers is Hester Industries, Inc., which operates a food processing plant in Moorefield, West Virginia. In 1984 Hester retained the services of a contractor, respondent Carl Belt, Inc., to perform construction work at its Moorefield plant. Respondent Joe D. Helmick was a laborer employed by Carl Belt at the Hester construction site.

In August 1986, Carl Belt commenced excavation operations utilizing heavy equipment in the vicinity of an electric utility pole that had been erected by petitioner at the Hester site earlier that year. The power line supported by that pole carried 19.5 kilovolts of electricity. The utility pole was stabilized by a grounded supporting guy wire.

Carl Belt's supervisors on the construction site determined that it would be more efficient for their operations to remove the supporting guy wire from the pole in order to facilitate the movement of a backhoe around the pole. At trial, Carl Belt's construction foreman testified that he asked Potomac Edison personnel to remove the guy wire but that petitioner's employees refused because removal of the wire would relax tension on the pole. Petitioner's employees testified that they had no record or recollection of Carl Belt's request, but agreed that the removal of this guy wire would create an unsafe condition, including the potential for the pole to collapse exposing workers on the site to downed high voltage lines. Carl Belt's employees testified that they did not appreciate this danger, nor the danger that the guy wire itself might become electrified if it came into contact with the energized equipment at the top of the utility pole.

Carl Belt's construction supervisors decided themselves to remove the guy wire from its anchor in the ground and

to attach to the wire a device known as a "come-along." The come-along provided extra slack in the wire and could be loosened or tightened as circumstances required. While the backhoe was operating in the vicinity of the pole Carl Belt's employees would loosen the come-along so that the guy wire could be removed out of the path of the equipment. On several occasions prior to October 24, 1986, Carl Belt's employees moved the guy wire in this fashion without incident.[1]

On October 24, 1986, while respondent Helmick was assisting in the movement of the guy wire, an uninsulated portion of the slackened wire came into contact with an energized lightning arrester at the top of the utility pole. The guy wire became electrified, and Mr. Helmick, who was handling the wire, suffered severe burns to his left forearm and the soles of his feet. Ultimately, Mr. Helmick's left arm had to be amputated at his elbow. *See* App. A, at 5a-6a.

In 1987, respondent Helmick filed a claim for workers' compensation benefits. On September 8, 1988, Mr. Helmick received a workers' compensation award of $53,760.00, predicated on a 60 percent permanent partial disability finding. App. A, at 6a-7a.

In 1988, while the workers' compensation proceedings were pending, respondents Joe D. and Tammy Helmick filed a civil action against both petitioner and respondent Carl Belt, Inc. in the Circuit Court for Hardy County, West Virginia. After the defendants removed the case to the United States District Court for the Northern District of West Virginia, predicated upon diversity jurisdiction, plaintiff filed an amended complaint in the

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[1] Carl Belt's employees testified that their use of the "come-along" to move the guy wire had been witnessed by unidentified Potomac Edison personnel. Petitioner's witnesses testified that Carl Belt's actions in moving the wire were not known to any of its construction or maintenance personnel, and were completely unanticipated. *See* App. A, at 6a.

state court, naming Hester Industries as an additional defendant. That amendment destroyed complete diversity, and the case remained in the Circuit Court. App. A, at 5a.

The Helmicks' claims against petitioner were premised on an allegation that the utility pole had been negligently designed and constructed in a manner that permitted the guy wire to come into contact with energized portions of the pole.[2] Under West Virginia's Workers Compensation Act, W. Va. Code § 23-2-6, injured employees generally are precluded from filing damage actions against their employers. The Helmicks' claims against Carl Belt were predicated on an exception to that principle of employer immunity first recognized by the West Virginia Supreme Court of Appeals in *Mandolidis* v. *Elkins Industries, Inc.*, —— W.Va. ——, 246 S.E.2d 907 (1978). A successful *Mandolidis* claim requires the injured employee to prove that his employer deliberately exposed him to a known hazard. *See* App. A, at 7a, n.3.

Petitioner filed cross-claims against both its co-defendants. It asserted a third-party *Mandolidis* claim for contribution or indemnity against respondent Carl Belt, and a contractual claim for indemnity against Hester Industries. On the eve of trial the Helmicks dismissed their *Mandolidis* claim against respondent Carl Belt; during the trial they dismissed their negligence claims against Hester. At the close of petitioner's case-in-chief on its cross-claims, the Circuit Court directed a verdict against petitioner on its *Mandolidis* claim against Carl Belt and directed a verdict against petitioner on one aspect of its contractual claim for indemnity against Hester. *See* App. A, at 7a.

The jury was given a special verdict form which directed it to assess the comparative negligence of petitioner, Carl Belt, and Mr. Helmick himself, and then to allocate the percentage of fault of each of these three

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[2] The complaint included a claim by Tammy Helmick for loss of consortium.

parties for Mr. Helmick's injuries. The jury also was asked to determine the total damages suffered by the Helmicks, and to determine whether Hester was liable to petitioner for breach of an agreement of indemnity. The jury found that respondent Joe D. Helmick had not been guilty of contributory negligence, but that both petitioner and Carl Belt had been negligent. The jury apportioned the total negligence between petitioner and Carl Belt at 40% and 60%, respectively. The jury found that the Helmicks' total damages amounted to $498,232.84, with $25,000.00 of that total assigned to Mrs. Helmick's loss of consortium claim. Finally, the jury determined that Hester was not liable to petitioner on its cross-claim for indemnity. *See* App. B, at 21a-22a.

Notwithstanding the jury's allocation of fault between petitioner and respondent Carl Belt, the Circuit Court applied West Virginia's precedents adopting the principles of joint and several liability and workers' compensation immunity for employers from third-party claims for contribution, and ordered that petitioner would be responsible for the full amount of the Helmicks' damages, including prejudgment interest that brought the total verdict to $515,621.86. App. C, at 25a.

Petitioner filed several post-trial motions, seeking *inter alia*: a modification of the judgment to reduce petitioner's liability to the Helmicks by 60%, proportionate to its percentage of fault as determined by the jury; a set-off of the Helmicks' verdict in the amount that already had been awarded to respondent Joe D. Helmick in workers' compensation benefits; and the entry of judgment in its favor, or a new trial, on its cross-claim for contribution against respondent Carl Belt. All these post-trial motions were denied in an Order dated October 6, 1989. App. D, at 26a.[3]

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[3] A subsequent motion based on asserted new evidence concerning the failure of several members of the jury panel to reveal certain facts during *voir dire* was denied on May 15, 1990. App. E, at 28a-29a.

On September 18, 1990, the West Virginia Supreme Court of Appeals granted petitioner's Petition for Appeal. In an opinion dated June 27, 1991, the Supreme Court of Appeals affirmed the Circuit Court's judgment.

With respect to the question presented herein, petitioner urged the West Virginia Supreme Court of Appeals to hold that the trial court had erred in directing a verdict in favor of respondent Carl Belt on its third-party claim for contribution. The Supreme Court of Appeals ruled that the evidence presented by petitioner at trial failed to meet the requirements of the "deliberate intention" exception to the principle of employer immunity that were first set forth in *Mandolidis* and later codified in W. Va. Code § 23-4-2(c)(2) (1983). The Court held that the *Mandolidis* exception was meant "to deter the malicious employer, not to punish the stupid one." App. A, at 10a-11a. While "Carl Belt was indeed negligent in allowing the events that led up to this accident to occur, . . . it was not malicious." *Id.* at 11a.

Alternatively, petitioner argued that the deprivation of its right to seek contribution or indemnity from a negligent employer protected by the West Virginia Workers Compensation Act violated the Fourteenth Amendment's Due Process Clause, as well as provisions of the West Virginia Constitution. The Supreme Court of Appeals rejected this argument based on its recent ruling in *Miller* v. *Monongahela Power Co.*, —— W. Va. ——, 403 S.E.2d 406 (1991), *cert. pending*, No. 91-146 (July 22, 1991).[4] In *Miller*, the Court had held that:

> The combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and (3) West Virginia's statutory workers' compensation immunity

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[4] The question presented in this Petition is essentially identical to the first question presented in *Monongahela Power* v. *Miller*, No. 91-146 (filed July 22, 1991).

does not violate federal due process and equal protection principles.

403 S.E.2d at 408, quoted in App. A, at 12a.

As it had done in *Miller*, the Supreme Court of Appeals recognized the compelling logic of petitioner's contention that it made no sense in a system of comparative negligence for a third-party tortfeasor to be saddled with more than its proportionate share of the damages awarded to an injured employee, while the employer, who was quilty of greater negligence, is held immune from liability. But the Supreme Court of Appeals apparently believed, erroneously, that the acceptance of petitioner's "logical point of view" would require the Court "to overturn over one hundred years of American tort law." App. A, at 12a.[5]

Finally, the Supreme Court of Appeals rejected petitioner's suggestion that it could soften somewhat the glaring inequities of the *Miller* ruling by adopting a rule that an injured employee's recovery against a third-party tortfeasor should at least be offset by the lesser of his workers' compensation benefits or the percentage of his tort recovery found by the jury to be attributable to the negligence of the immunized employer. The Court found no West Virginia precedent supporting that "equitable solution," and declined to adopt it. App. A, at 12a.[6] The judgment against petitioner and in favor of the Helmick respondents was affirmed, as was the judgment

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[5] As demonstrated below, very few states have adopted the bizarre combination of tort and workers' compensation principles espoused by the West Virginia Supreme Court of Appeals. Indeed, as petitioner had demonstrated in its brief in the Supreme Court of Appeals, the courts of several states have struck down the resulting systems of tort liability as violative of federal due process and equal protection principles. *See* pages 13 to 19 *infra*.

[6] The Supreme Court of Appeals also rejected several other contentions raised by petitioner, none of which is pertinent to the federal constitutional question presented herein.

against petitioner and in favor of respondent Carl Belt on petitioner's cross-claim for contribution.[7]

REASONS FOR GRANTING THE WRIT

I. WEST VIRGINIA'S SYSTEM OF TORT LIABILITY FOR COMPENSATING INJURED WORKERS VIOLATES FEDERAL DUE PROCESS AND EQUAL PROTECTION PRINCIPLES

The consequences of the rulings of the West Virginia Supreme Court of Appeals in this case and in *Miller* are as follows: Under its prior decision in *Bowman* v. *Barnes*, 168 W. Va. 111, 282 S.E.2d 613 (1981), a trial court is to present to the jury a special verdict form requiring the jury to assess the comparative fault of a third-party defendant and an employer for an injured worker's accident, in spite of the employer's workers' compensation immunity from liability. In this case, the jury found the employer's negligence to be 60% responsible for the accident. But absent proof of a deliberate intention by the employer to expose its employee to injury, that jury finding of employer negligence is meaningless. Under principles of joint and several liability, the third-party defendant is held responsible for the full amount of the verdict—it cannot seek contribution from the more negligent employer, nor is the injured worker's verdict reduced proportionate to the third-party defendant's comparative fault.

The West Virginia Supreme Court of Appeals now has ruled twice in recent months that this system of tort liability does not violate a third-party defendant's rights to due process and equal protection, without ever meeting the objection that the system is arbitrary and irrational, and without ever articulating any state policy objectives

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[7] By order dated July 17, 1991, the Supreme Court of Appeals stayed the effect of its opinion affirming the judgment until October 28, 1991, in order to permit a decision by this Court on a Petition for Writ of Certiorari.

that the system is designed to serve. In fact, this combination of workers' compensation immunity principles and tort doctrine advances no legitimate policy objectives; it merely serves instead to shift unfairly the responsibility for industrial accidents from culpable employers to less culpable third parties.

The leading commentator in the field has described the issue whether or not third-party tortfeasors should be afforded some sort of contribution remedy against a negligent employer as "[p]erhaps the most evenly-balanced controversy in all of workers' compensation law." Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483, 484, *quoted in Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193 n.3 (1983); *ibid.*, 460 U.S. at 199 (Rehnquist, J., dissenting). West Virginia, through the decisions of its Supreme Court of Appeals, has resolved that issue in the most unbalanced fashion imaginable. In so doing, the West Virginia Court has transgressed "the constitutional minimum of 'fundamental fairness,'" by which this Court may judge state court standards for the determination of one party's liability for another's injuries. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745, 756 n.8 (1982).[8] Moreover, the decision of the West Virginia Supreme Court of Appeals in this case is in direct conflict with decisions of several other state courts of last resort which have held similar aspects of their own systems of tort liability to violate federal constitutional

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[8] In *Martinez* v. *California*, 444 U.S. 277, 282 (1980), this Court afforded broad deference to the states' interests in fashioning their own rules of tort law, but recognized that that interest may not be paramount to the federal constitutional interest "in protecting the individual citizen from state action that is wholly arbitrary or irrational." *See also Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982); *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 781 (E.D.N.Y. 1984) ("the law believes it unfair to require an individual to pay for another's tragedy unless it is shown it is more likely than not that he caused it").

guarantees of due process and equal protection. *See* pages 13 to 16 *infra.*

As frankly conceded in the opinion below, the West Virginia Supreme Court of Appeals has adopted a system of comparative negligence, but has retained the doctrine of joint and several liability. App. A, at 12a. Thus, in a case in which an injured employee sues a third party for his injuries, he is entitled to recover all of his damages from that third party, even if a jury has determined that the employer is more responsible for the accident than the third party, and even if the plaintiff-employee is more responsible for the accident than the third party, so long as the combined negligence of the employer and the third-party defendant exceeds that of the plaintiff-employee. *See Miller* v. *Monongahela Power Co., supra,* 403 S.E.2d at 414.

In this case petitioner must pay 100% of the Helmicks' verdict even though the jury determined that its negligence was only 40% responsible for the accident. In *Miller*, the West Virginia Court ruled that even a 1% negligent third party would have to pay all the damages awarded to an injured employee, even if the jury determined that the employee was 10% negligent and his employer was responsible for the remaining 89% of the total fault. 403 S.E.2d at 414.

What the Court below also made explicit in its opinion is that, under West Virginia law, the third-party defendant in the tort action is absolutely precluded from suing the negligent employer for contribution, even though the employer's negligence, rather than that of the third party, was primarily responsible for the plaintiff's injuries. The West Virginia Supreme Court of Appeals consistently has read the statutory immunity afforded to employers under the Workers Compensation Act, W. Va. Code § 23-2-6, as precluding actions for contribution by third parties, even though that result was not ordained expressly by the legislature. *See Sydenstricker* v. *Uni-*

punch Products, Inc., 169 W. Va. 440, 288 S.E.2d 511, 516-17 (1982). *See also Miller* v. *Gibson*, ——, W. Va. ——, 355 S.E.2d 28, 31-32 (1987).[9] The only exception to this judicial gloss on the immunity afforded the workers' compensation employer by the legislature is where the employer may be deemed to have intentionally placed his employee in danger. The facts and rulings in this case demonstrate the narrow scope of this so-called *Mandolidis* exception. *See* page 7, *supra*.

Were it not for this judicial interpretation of W. Va. Code § 23-2-6, affording workers' compensation immunity to employers from third-party claims for contribution, petitioner would have prevailed on its claim for contribution against respondent Carl Belt, and would have been able to reduce its own liability to the Helmick respondents by 60%, a sum in excess of $300,000.00. The common-law right of one joint tortfeasor to seek contribution from another has been recognized in West Virginia since the formation of the State. *See Haynes* v. *City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544, 548-49 (1977). That common-law right of contribution has been codified by the legislature in W. Va. Code § 55-7-13, first enacted in 1872. The West Virginia legislature, according to the recent decisions of the Supreme Court of Appeals, abrogated the common-law and statutory right of contribution when it enacted the Workers Compensation Act in 1913. The arbitrary and irrational result is that a slightly negligent third party may be held liable for the totality of an injured employee's damages, while the plaintiff's negligent employer—even if primarily responsible for the accident—remains free from tort liability.

In a final irony of the West Virginia system of tort liability, up until recently it was one of only three states

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[9] W. Va. Code § 23-2-6, reprinted in App. F, simply states that an employer who is in good standing under the Workers Compensation Act "shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring . . . ."

that neither provided for a plaintiff's damages to be reduced by the amount of workers' compensation benefits he receives, *see Jones* v. *Appalachian Electric Power Co.*, 145 W. Va. 478, 115 S.E.2d 129 (1960), nor for the employer to be entitled to subrogation rights with respect to the judgment awarded or settlement obtained in the third party action, *see Jones* v. *Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). *See generally National Fruit Product Co.* v. *Baltimore & Ohio R.R.*, —— W. Va. ——, 329 S.E.2d 125, 127-29 (1985). Thus, the injured worker was entitled to a duplicative recovery of workers' compensation benefits plus any damages awarded by a jury or obtained in a settlement with an alleged third-party tortfeasor. *National Fruit Product, supra*, 329 S.E.2d at 129, n.2.[10]

In this case, the West Virginia Supreme Court of Appeals squarely rejected petitioner's federal constitutional argument that its system of comparative negligence, coupled with joint and several liability, and employer immunity from claims for contribution, violates Fourteenth Amendment due process principles. Other state courts of last resort, faced with similar or identical systems of allocating tort liability, have reached the opposite result.

For example, in *Carlson* v. *Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974), the Supreme Court of Minnesota was confronted with a provision of that state's workers' compensation law that expressly stated that "the employer shall have no liability to reimburse or hold [a

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[10] In legislation that became effective on July 1, 1990, and that applies only to claims arising from injuries after that date, the West Virginia legislature adopted a limited form of subrogation, enabling the employer to recover medical benefits paid under workers' compensation from the proceeds obtained by the employee in the third-party action. The amount to be received by the employer in subrogation, however, may not exceed 50% of the employee's recovery from the third party, net of any attorney's fees and costs. *See* W. Va. Code § 23-2A-1.

third-party tortfeasor] harmless on such judgments or settlements [obtained by his employee] in absence of a written agreement to do so executed prior to the injury." 215 N.W.2d at 617. The third-party tortfeasor in that case challenged the validity of the provision on federal due process grounds. The Court determined that a legislative decision to extinguish a common law right of contribution or indemnity would survive due process scrutiny if the legislature provided some reasonable substitute for the third party's rights and the legislation was rationally related to a legitimate state objective. 215 N.W.2d at 618. The *Carlson* Court held that the Minnesota legislation failed both tests.

The Court in *Carlson* observed that a third-party tortfeasor gains nothing from the more efficient remedial system created by the workers' compensation statute, and the legislature had provided no reasonable substitute for the abrogation of the third-party's common law right of contribution. Moreover, "[n]o legitimate objective is fostered by preventing indemnification to a third-party tortfeasor from a negligent employer." *Id.* at 619. The Court therefore held that the Minnesota statute affording workers' compensation immunity to employers from third-party contribution claims "violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution . . .," as well as similar provisions of the Minnesota Constitution. *Id.* at 620.[11]

The Florida Supreme Court reached the same result as the Minnesota Court in *Carlson*, relying on the Equal Protection Clause of the Fourteenth Amendment. *See Sunspan Engineering & Construction Co.* v. *Spring-Lock*

[11] The result reached in *Carlson* was reaffirmed by the Minnesota Supreme Court in *Lambertson* v. *Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679, 687 (1977). In *Lambertson*, the Court decided that under Minnesota's comparative negligence regime the third-party tortfeasor is entitled to contribution from a negligent employer "in an amount proportional to [the employer's] percentage

Scaffolding Co., 310 So. 2d 4 (Fla. 1975). In *Sunspan*, the Florida Supreme Court noted that under that state's workers' compensation law both the injured employee and his employer are given the right to sue an alleged third-party tortfeasor, "but unequally and unreciprocally the tort-feasor is precluded from suing in turn in a third party action the employer who may be primarily liable instead of the tort-feasor for the employee's industrial accident." 310 So. 2d at 7. This statutory result causes the third party to "suffer[] the burdens and restrictions of the [Workers Compensation] Act, while the employer receives a windfall . . . ." *Id.*

The Court concluded that the Florida legislature, in eliminating the third party's right of contribution, had created "an arbitrary and capricious innovation without any rational basis furthering any overpowering public necessity," and was therefore contrary to the Florida Constitution. Moreover, the fact that the Act singled out only those alleged tortfeasors who had provided goods or services to employers involved in accidents covered by workers' compensation, was deemed an arbitrary classification in violation of the Fourteenth Amendment's Equal Protection Clause. *Id.* at 8. The Florida Supreme Court recently reaffirmed *Sunspan*, over the dissent of one Justice, in *L.M. Duncan & Sons* v. *City of Clearwater*, 478 So. 2d 816 (Fla. 1985).[12]

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of negligence, but not to exceed [the employer's] total workers' compensation liability to plaintiff." 257 N.W.2d at 689.

[12] In a comparable decision that relied only on state constitutional grounds, the Kentucky Court of Appeals has held that the "exclusive remedy" provision of that state's workers' compensation statute does not insulate an employer from tort liability asserted by way of an action for indemnity by a "passively-negligent" third-party tortfeasor. *Kentucky Utilities Co.* v. *Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788 (Ky. 1969). The Kentucky Court ruled that any contrary reading of the statute would violate that provision of the Kentucky Constitution which forbids the General Assembly from abolishing pre-existing common law "jural rights."

In Ohio, the state's intermediate Court of Appeals adopted a different route to reach essentially the same result. In *Couch* v. *Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985), the Court determined that a co-employee of an injured worker was protected by workers' compensation immunity from a claim for contribution by a third-party tortfeasor. But the Court reasoned that under the State's system of comparative negligence, the third party should be entitled to a jury determination of the co-workers' percentage of fault, and should be held liable only for his own proportionate share of the total negligence contributing to the injured employee's damages. In reaching this result, the Court observed that "[t]he fact that [the third party otherwise] is obligated to pay more than his proportionate share of liability [to the plaintiff] also violates his right to due process of law and his right to equal protection under the law. It also offends our basic sense of equity and fair play." 497 N.E.2d at 1375. As this case demonstrates, in West Virginia the third party may be entitled to a jury determination of the employer's percentage of comparative fault, but that finding is meaningless—the third party still must pay all the injured worker's damages.

To be sure, other state and federal courts have rejected constitutional arguments akin to those presented by this Petition.[13] However, there is substantial conflict in the law over the application of federal due process and equal protection principles to this area of a third-party tortfeasor's rights and remedies against a negligent employer. In addition, many state courts that operate under a system of comparative negligence have abrogated

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[13] *See, e.g., Hudson* v. *Union Carbide Corp.*, 620 F. Supp. 558, 564-65 & n.8 (N.D. Ga. 1985) (expressly noting the conflict with *Carlson* and *Sunspan*); *Williams* v. *White Mountain Construction Co.*, 749 P.2d 423 (Colo. 1988); *Raisler* v. *Burlington Northern R.R. Co.*, 219 Mont. 254, 717 P.2d 535 (1985); *Tsarnas* v. *Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980); *Mulder v. Acme-Cleveland Corp.*, 95 Wis.2d 173, 290 N.W.2d 276 (1980).

or modified the doctrine of joint and several liability so that a less negligent third party, such as petitioner in this case, is not unfairly saddled with liability for the proportionate fault of the more negligent employer who is immunized by a workers' compensation act.[14]

In fact, at least some of the decisions that have rejected federal constitutional challenges to workers' compensation immunity from third-party claims for contribution have done so in express reliance upon the ground that the third party would *not* be subjected to joint and several liability for the employer's proportionate share of the damages. *See, e.g., Williams* v. *White Mountain Construction Co.*, 749 P.2d 423, 428-29 (Colo. 1988) (noting that the third-party tortfeasor is not required to shoulder a disproportionate share of liability because under the Colorado system of comparative negligence, and the legislative abolition of joint and several liability, tortfeasors sued by injured employees are able to present evidence of employer liability at trial and to "reduce whatever damages may be assessed against them to a level proportionate to their [own] liability"); *cf., In re Air Crash Disaster at Stapleton*, 720 F. Supp. 1465, 1466-67 (D. Colo. 1989) (applying similar analysis to constitutional challenge to governmental immunity from third-party contribution claims).

Moreover, in many other comparative negligence states, such as Ohio, discussed *supra*, the legislatures or the courts have required that the immune employer's percentage of negligence be determined by the jury, and the third party's liability to the plaintiff reduced to reflect

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[14] Of the forty-five states that have adopted some form of comparative negligence, either by legislation or judicial decision, eight have abolished the doctrine of joint and several liability. *See* V. Schwartz, *Comparative Negligence* § 16.4 (2d ed. 1986 & 1990 Supp.). At least fourteen other states have limited their application of joint and several liability principles so that the doctrine does not apply to most forms of negligence actions or to non-economic damages. *See* V. Schwartz, *supra*, at pp. 50-51 (1990 Supp.).

only its proportionate share of the total fault, or reduced to reflect the benefits received by the plaintiff from the workers' compensation employer. *See, e.g., Associated Construction & Engineering Co.* v. *Workers' Compensation Appeals Bd.*, 22 Cal.3d 829, 150 Cal. Rptr. 888, 587 P.2d 684 (1978); *Runcorn* v. *Shearer Lumber Products, Inc.*, 107 Idaho 389, 690 P.2d 324, 330-31 (1984); *Scales* v. *St. Louis- San Francisco Ry.*, 2 Kan. App. 2d 491, 582 P.2d 300 (1978); *Bartlett* v. *New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (1982); *Leonard* v. *Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983); *Bode* v. *Clark Equipment Co.*, 719 P.2d 824 (Okla. 1986); Ariz. Rev. Stat. Ann. § 12-2506(B) (1987); Wash. Rev. Code Ann. § 4.22.070(1) (1986).

Finally, in at least two states, the courts of last resort have held that the immunity afforded to the employer by the workers' compensation statute was not intended by the state legislatures to eliminate a third party's claim for indemnity or contribution. *See Skinner* v. *Reed-Prentice Division*, 70 Ill.2d 1, 374 N.E.2d 437, *cert. denied*, 436 U.S. 946 (1978); *Dole* v. *Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 383, 282 N.E.2d 288 (1972).

The opinion of the West Virginia Supreme Court of Appeals in this case erroneously suggested that the acceptance of petitioner's constitutional arguments would require that Court "to overturn over one hundred years of American tort law." App. A, at 12a. In fact, nearly half of the states' legislatures and courts now have recognized that the retention of the doctrine of joint and several liability is itself fundamentally incompatible with a system of comparative negligence. *See* V. Schwartz, *Comparative Negligence* § 16.4 (2d ed. 1986 & 1990 Supp.). In addition, many other states have recognized that to immunize negligent employers from claims for contribution by alleged third-party tortfeasors unfairly shifts the burden of industrial accidents from those employers to the third parties. Finally, many state

courts operating under a comparative negligence system reduce the third party's liability to the employee-plaintiff proportionate to the third party's own percentage of fault, or at least reduce the plaintiff's award of damages commensurate with his receipt of workers' compensation benefits.

The solutions presented by petitioner, and rejected by the West Virginia Supreme Court of Appeals, need not impinge at all on the employer's statutory immunity from costs in excess of those imposed by the workers' compensation system. Moreover, the adoption of those solutions would still preserve the employee's ability to sue third parties for damages in excess of his workers' compensation benefits. Other states that have acted consonant with these legitimate legislative objectives have adopted these solutions. By doing so they have prevented the fundamental unfairness of saddling a slightly negligent third party, such as petitioner, with all the damages awarded to an injured employee (who himself may have been more responsible for his injuries), while immunizing his negligent employer from any liability.

The failure of the West Virginia legislature and Supreme Court of Appeals to adopt any of these solutions yields the inequitable results presented by this case. The West Virginia Court's admixture of workers' compensation and tort principles is wholly arbitrary and irrational.[15] And it is clear that unless this Court grants

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[15] Professor Paul C. Weiler recently surveyed the possible "alternative relations" of third-party tort liability and workers' compensation immunity for employers, noting the widespread nature of this problem in the modern economy. Weiler, *Workers' Compensation And Product Liability: The Interaction Of A Tort And A Non-Tort Regime*, 50 Ohio St. L.J. 825 (1989). Although Professor Weiler's analysis is grounded more in economic policy than constitutional jurisprudence, his conclusion is telling: "The standard response in most of the states, which effectively insulate even the egregiously culpable employer from any responsibility through a combination of employer subrogation for [workers' compensation]

plenary review of the decisions in this case and in *Miller*, the West Virginia Supreme Court of Appeals will continue on its present course, failing to recognize the "paramount" "federal constitutional interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez* v. *California*, 444 U.S. 277, 282 (1980).

When this Court first upheld the constitutionality of workers' compensation legislation, it did so with a caveat: "Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, *without providing a reasonably just substitute.*" *New York Central R.R.* v. *White*, 243 U.S. 188, 201 (1917) (emphasis added). As recently as its decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), this Court reexamined the essential compromise of workers' compensation legislation, whereby "employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue [their employer]." 460 U.S. at 194.[16] What the West Virginia Supreme Court of Appeals has failed to acknowledge in this case is that petitioner, as a third-party tortfeasor, is a stranger to that legislative "*quid pro quo.*" In the

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benefits and immunity from any contribution to the third party's tort liability, makes little sense." *Id.* at 854.

[16] In *Lockheed*, this Court held that the exclusive remedy provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), does not bar a third party's indemnity action against the governmental employer, in the absence of evidence that Congress had intended to disturb settled doctrines of tort law affecting categories of parties who did not themselves benefit from the legislative *quid pro quo*. *See* 460 U.S. at 196-98. *See also Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 601 (1963) (reaching the same result under the Longshoremen's and Harbor Workers' Compensation Act).

words of Professor Larson, it is unfair for the workers' compensation scheme "to pull the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain." Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U.L. Rev. 351, 420 (1970).

As demonstrated herein, there are multiple solutions to the overwhelming unfairness of the system devised by the West Virginia legislature and implemented by the Supreme Court of Appeals. The Court or legislature could recognize the continuing vitality of a third party's right to claim contribution from a negligent employer such as respondent Carl Belt, which the highest courts of Florida and Minnesota have required as a federal constitutional minimum. Or the Court or legislature could require that a third party be held responsible only for its proportionate share of the fault, which the Ohio courts have held to be required by due process and equal protection principles. Or the Court or legislature could recognize the basic incongruity between the principles of comparative negligence and joint and several liability, as many state courts and legislatures have done. In the absence of any of these remedies, however, the tort system of West Virginia, as presently constituted and as applied in this case, violates principles of "fundamental fairness."

Because state courts of last resort have decided the federal constitutional questions presented by this Petition in ways that conflict with the decisions of the West Virginia Supreme Court of Appeals, and because of the importance of the issues raised by the application of federal due process and equal protection principles to the states' methods of affording workers' compensation immunity to third-party claims for contribution, the decision below warrants plenary review by this Court. Petitioner should be entitled, as the constitutional minimum guaranteed by the Due Process Clause, to have the jury's determination

that Mr. Helmick's accident was 60% attributable to the fault of Carl Belt count for something in any calculation of damages owed to the Helmicks by petitioner. Under the consistent rulings of the West Virginia Supreme Court of Appeals, however, that jury finding was totally meaningless. The system of tort liability imposed by that Court on those who are unfortunate enough to be sued for on-the-job injuries suffered by workers who are also the beneficiaries of the state's workers' compensation legislation can only be described as bizarre. In constitutional terms, the system is wholly arbitrary and irrational, and fails to serve any legitimate state policy objective.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

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APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1991 Term

No. 19772

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs Below, Appellees

v.

POTOMAC EDISON COMPANY, A MARYLAND CORPORATION,
Defendant Below,

CARL BELT, INC., A MARYLAND CORPORATION,
HESTER INDUSTRIES, A CORPORATION,
Defendants Below, Appellees,

POTOMAC EDISON COMPANY, A MARYLAND CORPORATION,
Defendant Below, Appellant

Appeal from the Circuit Court of Hardy County
Honorable John M. Hamilton, Judge
Civil Action No. 88-C-118

AFFIRMED

Submitted: May 14, 1991

Filed: June 27, 1991

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JUSTICE NEELY delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "A company maintaining an electric line, over which a current of high and dangerous voltage passes, in a place to which it knows or should anticipate others lawfully may resort for any reason, such as business, pleasure or curiosity, and in such manner as exposes them to danger of contact with it by accident or inadvertence, is bound to take precautions for their safety by insulation of the wire or other adequate means." Syllabus Point 2, *Love v. Virginian Power Co.*, 86 W.Va. 393, 103 S.E. 352 (1920).

2. To establish "deliberate intention" in an action under *W. Va. Code*, § 23-4-2(c)(ii) (1983), a plaintiff or cross-claimant must offer evidence to prove each of the five specific statutory requirements.

3. "The combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and, (3) West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection principles." Syllabus Point 5, *Miller v. Monongahela Power Co.*, W.Va. ——, 403 S.E.2d 406 (1991).

4. Contracts of adhesion by which monopolies require indemnification for incidents in which the monopoly is at fault are void as against public policy.

5. "Under *W. Va. R. Civ. P.* 26(b)(4)(i), 'a party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when that party has determined *within a reasonable time before trial* who his expert witnesses will be.'" Syllabus Point 3, *Michael v. Henry*, —— W.Va. ——, 354 S.Ed2d 590 (1987) (emphasis added).

6. The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.

7. "A trial court is afforded wide discretion in determining the admissibility of photographic evidence." Syllabus Point 6, *Miller v. Monongahela Power Co.*, —— W.Va. ——, 403 S.E.2d 406 (1991).

8. "Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption." Syllabus Point 5, *Roberts v. Stevens Clinic Hosp.*, —— W.Va. ——, 345 S.E.2d 791 (1986).

9. As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement except when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Neely, J.:

Joe D. Helmick and Tammy Helmick brought an action against Potomac Edison Company in the Circuit Court of Hardy County for injuries that Mr. Helmick received in moving a guy wire attached to a Potomac Edison utility pole. After removal to the United States District Court for the Northern District of West Virginia, the Helmicks added Hester Industries, Inc., on whose property the injury had occurred, as a defendant, destroying diversity jurisdiction, and the case was returned to the Circuit Court of Hardy County. Potomac Edison cross-claimed against Carl Belt, Inc., Mr. Helmick's employer, for its negligence. Potomac Edison now appeals the verdict against it for $515,621.86 and the trial court's dismissal of its claims against Hester and Carl Belt. We affirm.

On 24 October 1986, Joe D. Helmick, burned his left forearm and the soles of both of his feet when he attempted to move a guy wire connected to a utility pole that was supporting power lines operated by Potomac Edison. Ultimately, Mr. Helmick's left arm had to be amputated at the elbow. Skin grafts to his feet have allowed Mr. Helmick to walk again. Although Mr. Helmick returned to work with Carl Belt, he is no longer able to do the heavy manual labor for which he was originally hired.

At the time of the accident, Carl Belt was an independent contractor employed by Hester Industries, Inc. to do construction at Hester's Moorefield plant in Hardy County. During construction, the guy wire attached to the utility pole had to be moved several times to allow construction. Carl Belt asked Potomac Edison to send someone to remove the guy wire temporarily; Potomac Edison refused for the alleged reason that to do so would relax tension on the pole. The jury, however, could have reasonably inferred that the true reason for defendant's uncooperative response was an unwillingness to under-

take additional work. Following Potomac Edison's refusal, Carl Belt's employees successfully moved the wire on several occasions.

When the accident happened, Mr. Helmick (along with Allan Street and Dale White, two other employees of Carl Belt) was trying to move the guy wire by means of a come-along [1] that was attached to it. Carl Belt's employees had attached the come-along to the guy wire approximately one to two months before the accident for use in moving the wire. The come-along was left attached for this one to two month period in full view, and, in fact, Potomac Edison's employees had seen Carl Belt's employees use the come-along to move the guy wire.

The utility pole was erected pursuant to a 1982 agreement between Potomac Edison and Hester for Potomac Edison to provide electricity to Hester.[2] Potomac Edison points out that it moved the pole onto Hester's property without an explicit new grant of right-of-way for the pole, but there was also no explicit agreement between Potomac and Hester that ownership of the pole would be transferred. When Potomac moved the pole they did not remove their ownership tag from the pole, but instead left it there indicating Potomac Edison's continued ownership of the pole.

Before trial, Mr. Helmick received an award of $53,760 from West Virginia Workers' Compensation. Shortly be-

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[1] A come-along is a mechanical device used to grip two objects and pull them together. It consists of two jaws attached to a ring so that the jaws are closed by pulling on the ring. *Webster's Third New International Dictionary*, 265 (G. &C. Merriam Co. 1970).

[2] The agreement was a standard form contract supplied by Potomac Edison with two additional typewritten paragraphs. The two paragraphs at issue in the court below were Paragraph 7, Potomac Edison's standard indemnification agreement and, Paragraph 15, one of the typewritten paragraphs pertaining to Hester's duty to protect certain property (specifically a transformer) leased from Potomac Edison.

fore trial, the plaintiffs dismissed their *Mandolidis*[3] claims against Carl Belt, although Potomac Edison continued to pursue its *Mandolidis* cross-claim against Carl Belt.

After the close of Potomac Edison's case in chief, the trial court directed a verdict against Potomac Edison on its *Mandolidis* cross-claim against Carl Belt. The trial court also granted Hester's motion for directed verdict against Potomac Edison on its claim for indemnification under paragraph 7 of the 1982 agreement.

The court sent to the jury the question of Potomac Edison's liability to the Helmicks and the question of Hester's liability to Potomac Edison under paragraph 15 of the 1982 agreement. The jury returned a verdict of $473,232.84 in favor of Mr. Helmick and a verdict of $25,000.00 in favor of Ms. Helmick. Prejudgment interest brought the total to $515,621.86. The jury also found that Potomac was 40% liable, that Carl Belt was 60% liable, and that Mr. Helmick was not liable. On the basis of paragraph 15, the jury found Hester not liable.

The judge then ordered that Potomac Edison pay the full amount of the verdict.

I.

Potomac Edison now appeals to this Court with nine assignments of error. Hester cross-assigns three errors. Much of Potomac Edison's argument asks us to re-plow the ground that we covered in the recent case of *Miller*

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[3] *Mandolidis* claims take their name from this court's decision in *Mandolidis v. Elkins Industries, Inc.*, —— W.Va. ——, 246 S.E.2d 907 (1978). Ordinarily *Mandolidis* claims are brought by injured employees who seek to recover from their employers beyond the coverage of the Workers' Compensation system. To make such a recovery, the employee must prove that his employer acted with deliberate intention in exposing him to the hazard. In the present case, Potomac Edison seeks to recover *Mandolidis* damages as a cross-claim.

v. Monongahela Power Company, —— W.Va. ——, 403 S.E.2d 406 (1991). In *Miller*, we held that:

> In a consistent line of cases stretching back over nearly a century, we have held that electricity is an inherently dangerous instrumentality and that its management requires a peculiarly high level of care. In this regard, although we have never gone so far as to make electric companies insurers, we have come reasonably close by making it clear that any deviation from the highest possible standard of care is sufficient to impose liability.

Miller at ——, 403 S.E.2d at 411.

In *Miller*, we also noted:

> A company maintaining an electric line, over which a current of high and dangerous voltage passes, in a place to which it knows or should anticipate others lawfully may resort for any reason, such as business, pleasure or curiosity, and in such manner as exposes them to danger of contact with it by accident or inadvertence, is bound to take precautions for their safety by insulation of the wire or other adequate means. Syllabus Point 2, *Love v. Virginian Power Co.*, 86 W.Va. 393.

Miller at ——, 403 S.E.2d at 411.

Today, we reaffirm these holdings. The jury could reasonably have found that Potomac Edison acted negligently when it did not remove the guy wire *or* move the utility pole at Carl Belt's request, and that Potomac was negligent when it put up this terminal utility pole with the guy wire and the electrical wires on the same side.[4]

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[4] As the testimony at trial showed, the standard for terminal utility poles (even those in Potomac Edison's own materials) is that the guy wire and the electrical wires be placed on opposite sides of the utility pole.

II.

Potomac Edison's first three assignments of error involve Carl Belt and its immunity from suit under West Virginia Workers' Compensation. Although Mr. Helmick dropped his *Mandolidis* claim against Carl Belt before trial, Potomac Edison continued to pursue its *Mandolidis* cross-claim at trial. Potomac Edison claims that the trial court should not have directed a verdict against it on this claim.

The West Virginia Workers' Compensation Act provides compensation to employees injured at their work place while also protecting employers from civil litigation by injured employees. There is an exception to this immunity, however, when the employee's injury is the result of the employer's "deliberate intention" to cause that injury. The legislature has codified the "deliberate intention" standard in *W. Va. Code*, 23-4-2(c)(2) [1983], which provides in pertinent part:

> The immunity from suit provided under this section and under § 6-A [§ 23-2-68], article II of this chapter, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention." This requirement may be satisfied only if:
>
> (i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or
>
> (ii) The trier of fact determines, either through specific findings of fact made by the court in a trial

without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the work place which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such unspecific [*sic*] unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with the statute, rule, regulation or standard generally requiring safe work places, equipment or working conditions;

(D) That notwithstanding the existence of facts set forth in sub-paragraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

In the case before us, Potomac Edison asserts that its claim under sub-section (ii) should have been allowed to go to the jury.

The "deliberate intention" exception to the Workers' Compensation system is meant to deter the malicious em-

ployer, not to punish the stupid one. Carl Belt was indeed negligent in allowing the events that led up to this accident to occur, but it was not malicious.

The evidence showed that Carl Belt did not realize the danger, and that, in fact, some of Carl Belt's supervisory personnel took part in the moving of the guy wire on several occasions. Potomac Edison offered no evidence of the violation of a safety statute or of a commonly accepted practice within the industry and certainly no evidence that Carl Belt intentionally exposed Mr. Helmick to this harm. Therefore, Potomac Edison did not meet at least three of the elements required by *W. Va. Code*, 23-4-2 [1983], to show "deliberate intention."

W. Va. Code 23-4-2(c)(2)(iii)(B) [1983] specifically provides:

> [for] prompt judicial resolution of issues of immunity from litigation under this chapter. . . . The court shall dismiss the action upon a timely motion for directed verdict . . . if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court shall determine that there is not sufficient evidence to find each and every one of the facts required to be proven . . .

Consistent with the legislature's command of prompt judicial resolution when appropriate, the trial court directed a verdict against Potomac Edison on its *Mandolidis* cross-claim, and we find no error.[5]

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[5] The case at hand is clearly different from this court's recent decision in *Mayles v. Shoney's, Inc.*, —— W. Va. ——, —— S.E.2d —— (No. 19530 filed December 20, 1990), which appellant cites to us. In *Mayles* the plaintiff was made to carry a hot bucket of grease out of the restaurant and down a steep grassy slope to a disposal area. The manager knew that such conditions existed and consciously appreciated that such conditions were dangerous, but did not act to change the conditions.

Potomac Edison next claims that if it is deprived of its right of contribution and indemnity under the West Virginia Workers' Compensation Act, then the Act violates the due process clause of the *Constitution of the United States* and *W. Va. Const.*, art. III, § 17, which insures access to the courts. This argument is squarely addressed in our recent decision of Miller, *supra*. As we stated in syllabus point 5 of *Miller*:

> The combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and, (3) West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection principles.

Although Potomac Edison presents a good argument from a strictly logical point of view, its argument would require us to overturn over one hundred years of American tort law. Again,

> [t]herefore, notwithstanding the novelty, ingenuity and even logic of [Potomac Edison's] argument, we decline to rewrite the entire tort law of West Virginia in one fell swoop based on supposed federal principles without explicit federal direction.

Miller at ——, 403 S.E.2d at 414.

Potomac Edison next offers an "equitable" solution that would allow a set-off from its claim by the lesser of Workers' Compensation benefits paid to Mr. Helmick or the percentage of negligence assigned to Carl Belt. Such a rule in this case would allow Potomac Edison to set off $53,760. Potomac Edison admits there is no West Virginia precedent for such an "equitable" solution, and we decline to develop such a new rule today.

III.

On appeal Potomac Edison bases its claims against Hester on paragraph 7 of the 1982 agreement which provides:

> That the customer [Hester] agrees to at all times indemnify or save harmless the company [Potomac Edison] from and against all claims, demands, suits, actions and judgments and from and against all costs, expenses, pecuniary or other loss that may arise out of any damage, injury or loss of or to person, life and (or) property caused by any act or omission of the customer [Hester], its agents, servants and employees, and particularly caused by improper installation or defective equipment and (or) the operation of any equipment; but the customer [Hester] will not be responsible for or on account of, nor will it indemnify or save harmless the company [Potomac Edison] from and against, any such claim, demand, suit, action, judgment, cost, expense or loss that may arise out of any such damage, injury or loss caused by the sole negligence of the company [Potomac Edison], its agents, servants and employees. . . .

Paragraph 7 is part of Potomac Edison's standard contract that it requires of commercial customers. An adhesion contract is generally defined as one "drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere." *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981); *see also Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967); *Ponder v. Blue Cross of Southern California*, 193 Cal. Rptr. 632, 145 Cal.App.3d 709 (1983); *Cushman v. Frankel*, 314 N.W.2d 705 (Mich. App. 1981); *Zuckerberg v. Blue Cross and Blue Shield of Greater New York*, 464 N.Y.S.2d 678, 119 Misc.2d 834 (1983).

In monopoly situations, the buyer is not able to negotiate contract terms freely, as it would be able to do in ordinary business situations. The 1982 agreement that Potomac Edison required Hester to sign in order to obtain electricity is a contract of adhesion.

We have previously addressed the question of adhesion contracts that require arbitration. While holding such contracts ordinarily enforceable, we found an exception where a gross disparity in bargaining power resulted solely from the monopolistic position of one of the parties. *Board of Education v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977).

The Supreme Court of Virginia has addressed the issue in this case more directly, finding:

> Where a *public duty* is involved, a public service company cannot relieve itself, either directly or indirectly, from liability to one whom the duty is owed.

Richardson-Wayland Electrical Corp. v. Virginia Elec. & Power Co., 219 Va. 198, 247 S.E.2d 465, 467 (1978) (emphasis added).

We find the reasoning of the Virginia Supreme Court persuasive, and today adopt a similar rule. Contracts of adhesion by which monopolies require indemnification for incidents in which the monopoly is at fault are void as against public policy.

IV.

Potomac Edison's fifth, sixth and eighth assignments of error involve evidence. The circuit court did not allow John St. Clair to testify as an expert witness on behalf of Potomac Edison. As Potomac Edison notes in its brief:

> The other parties objected because Mr. St. Clair was disclosed as a witness after a discovery cutoff deadline of July 3, 1989. However, two other witnesses, specifically William E. Johnson, an economist, and Stephen Townsend, a psychologist were also noticed after the discovery cutoff date and the other parties made no objection to their testimony.

Potomac Edison brief at 42.

What Potomac Edison failed to note in its brief was that Mr. Johnson and Mr. Townsend were disclosed as expert witnesses on July 10, 1989, one week before the beginning of the trial. Mr. St. Clair's appearance, on the other hand, was noticed only by fax to opposing counsels' offices on the Sunday before the opening of trial on Monday morning.

We stated in *Hulmes v. Catterson*, —— W.Va. ——, 388 S.E.2d 313 (1989), quoting from Syllabus Point 3 of *Michael v. Henry*, —— W.Va. ——, 354 S.E.2d 590 (1987):

> Under *W. Va. R. Civ. P.* 26(b)(4)(A)(i), "a party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when that party has determined *within a reasonable time before trial* who his expert witnesses will be" (emphasis added).[6]

As a matter of law, notice of an expert witness by fax to a law office that will in all likelihood be empty,[7] on a Sunday less than twenty-four hours before the trial is to begin on Monday morning is not made *within a reasonable time before trial.*

Potomac Edison also assigns error to the refusal of the trial court to strike the testimony of Dr. Clarence E. Jones, plaintiffs' expert. Rule 703 of the *W. Va. R. Evid.* [1985] provides as follows:

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[6] Potomac Edison refers us, instead, to a footnote in that same opinion where we quoted from the Advisory Committee note to the *Fed. R. Civ. P.* which states: "Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be." Because Potomac Edison is so careful in reading footnotes, we note here for them that we generally consider the points that we put in the text to be more important than those we relegate to footnotes.

[7] By happenstance, one of the opposing lawyers was in his office on this particular day.

> The facts or data in the particular case on which an expert bases on opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in their field in forming opinions or inferences upon the subjects, the facts or data need not be admissible evidence.

Potomac claims that Dr. Jones' testimony was inadmissible because his testimony referred to the 1977 National Electrical Safety Code instead of the 1984 National Electrical Safety Code, and because he relied upon one of Potomac Edison's Transmission and Distribution manuals that came into effect after the accident occurred. Based on these data, and his other expertise, Dr. Jones testified essentially that Potomac Edison was negligent for not installing an insulator on the guy wire and for installing the guy wire on the same side of the utility pole as its high voltage equipment. After his testimony, counsel for Potomac Edison had ample opportunity to cross-examine Dr. Jones on his opinion and on the basis for his opinion. The jury was then able to consider Dr. Jones' testimony for what it was worth.

The admissability of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong. The trial court's refusal to strike Dr. Jones' testimony was within his sound discretion.

Potomac Edison's eighth assignment of error is that the trial court should not have admitted photographs of Mr. Helmick's injuries because the photographs were gruesome and because the photographs were of areas in which Mr. Helmick admitted that he experienced no pain. We find this claim incredible. Although Mr. Helmick may have suffered no pain in the regions photographed, the photographs offered other evidence. They could have shown the extent of cosmetic damage to Mr. Helmick, and they could have demonstrated the extent of his injury and the degree of his disability.

As we noted in Syllabus Point 6 of *Miller, supra*:

> A trial court is afforded wide discretion in determining the admissability of photographic evidence.

Admission of this photographic evidence was clearly within the sound discretion of the trial court.

V.

Potomac Edison's seventh assignment of error is that the trial court erred in failing to reduce the damages awarded to Mr. Helmick because of Mr. Helmick's failure to mitigate damages. Before the accident, Mr. Helmick was a strong, able-bodied laborer with a grade school education and an IQ in the low 80's. Now Mr. Helmick has a grade school education, an IQ in the low 80's, but has only one arm and no longer can do heavy manual labor. Yet Potomac Edison claims that Mr. Helmick could have obtained other employment after he was laid off by Carl Belt but that he did not attempt to do so. Perhaps Mr. Helmick should have looked for work as a door stop in Southern California? We think not.

Determining damages is the job of the jury and, as we held in Syllabus Point 6 of *Roberts v. Stevens Clinic Hosp.*, —— W.Va. ——, 345 S.E.2d 791 (1986):

> Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption.

Before the accident, Mr. Helmick performed manual labor such as digging ditches. Unfortunate as the circumstances are, there is not a great need in West Virginia for one-armed ditch diggers. Potomac Edison was free to offer evidence of Mr. Helmick's failure to mitigate his damages and was free to catalogue at length all of the high paying jobs available to him in the Greater

Hardy County Metropolitan area. Perhaps if Potomac Edison had offered such evidence or evidence that it had offered Mr. Helmick a job but that he had refused, the jury would have found the damages to be lower. As the evidence was, the jury was entitled to find that Mr. Helmick was completely disabled and *unable* to find other work.

VI.

Potomac Edison's final assignment of error pertains to supposed irregularities in the makeup of the jury. Potomac Edison tendered an affidavit of a private investigator who alleged irregularities with the jury. Even if we assume that these allegations are true, we find no grounds for a new trial. First, Potomac Edison alleges that because two of the jurors were married, the jury was prejudiced against Potomac Edison. We find no merit in this claim.

Second, Potomac Edison claims that because one of the juror's spouses had been killed in an industrial accident, the jury was biased against Potomac Edison. Potomac Edison was allowed to request inquiry into such matters on voir dire and did not do so. It is not the province of this Court to do for appellants on appeal what their lawyers did not do on voir dire. We hold, therefore, that the makeup of the jury was not prejudicial to appellant, Potomac Edison.

VII.

Appellee Hester cross-assigns three errors, two of which are no longer relevant.

Hester's third claim is that the trial court erred in not granting its attorneys' fees and court costs because Potomac Edison erroneously represented that Hester owned the utility pole involved in the accident. As we noted in Syllabus Points 2 and 3 of *Sally-Mike Properties v. Yokum*, —— W.Va. ——, 365 S.E.2d 246 (1986):

> As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. [But]
>
> There is authority in equity to award to the prevailing litigant his or her attorney's fees as "costs," without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

The evidence shows that Potomac Edison did not act in bad faith, vexatiously, wantonly, or for oppressive reasons. Indeed, our opinion demonstrates that Potomac Edison had one claim against Hester that was worthy of review by this court.

VIII.

Therefore, for the reasons set forth above, the judgment of the Circuit Court of Hardy County is affirmed.

Affirmed.

APPENDIX B

IN THE CIRCUIT COURT
OF HARDY COUNTY, WEST VIRGINIA

Civil Action 88-C-118

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs,

v.

POTOMAC EDISON COMPANY, a Maryland Corporation, and CARL BELT, INC., a Maryland Corporation, HESTER INDUSTRIES, a corporation,
Defendants.

JURY ORDER

On a previous date, July 10, 1989 came the plaintiffs, Joe D. Helmick and Tammy Helmick, in person, and by their attorneys, Donald E. Cookman and Frank E. Simmerman, Jr., and came the defendants, Potomac Edison, through its counsel, Clarence E. Martin, III, Hester Industries, Inc., through its counsel, Joseph A. Wallace, Paul J. Harris, Esquire, and Carl Belt, Inc., by Charles R. Smith.

Thereafter, on July 10, 1989, the following jury was selected and sworn to well and truly try all issues herein:

1. Carol R. Hefner;
2. Lou Ann Miller;
3. Mark S. Roomsburg;
4. Samuel D. Miller, Jr.;
5. Rodney L. Tunsing;
6. Chester R. Tharpe.

The following jurors were selected and sworn to serve as alternates:

1. Marcia Fisher Rudolph;

2. Diana S. Hypes.

Thereafter, on July 17, 19, 20, and 21, 1989, evidence was presented, on its motion Carl Belt, Inc. was dismissed as a party to which objections were saved, and after the Court excused both alternate jurors, the jury retired into their chambers for deliberations.

After some time, the jury returned into the Court, and upon their oaths, returned the following verdict:

VERDICT FORM

No. 1 Do you find that the Potomac Edison Company was guilty of negligence?

Yes X No ____

No. 2 If you answered No. 1 "Yes", do you also find that negligence was a proximate cause of Joe Helmick's injuries?

Yes X No ____

NOTE: If you answered "No" to either No. 1 or No. 2, the Foreman should now sign the Verdict Form and notify the Sheriff.

If you answered both No. 1 and No. 2 "Yes", then you should proceed to answer Nos. 3, 4, 5, 6, 7, 8, 9, & 10.

No. 3 Do you find that Joe Helmick was guilty of negligence?

Yes ____ No X

No. 4 If you answered No. 3 "yes, do you also find that negligence was a proximate cause of Joe Helmick's injuries?

Yes ____ No ____

No. 5 Do you find that Carl Belt, Inc. was guilty of negligence?

Yes X No ____

No. 6 If you answered "Yes" to No. 5, do you also find that negligence was a proximate cause of Joe Helmick's injuries?

Yes X No ____

No. 7 Using 100% to represent the total negligence of all parties to the accident, apportion the negligence among them:

JOE HELMICK	0 %
POTOMAC EDISON CO.	40 %
CARL BELT, INC.	60 %
TOTAL:	100 %

No. 8 State the total amount of damages which you find were sustained by Plaintiff Joe D. Helmick as a result of the occurrence. In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Plaintiff Joe D. Helmick.

$ 473,232.84

No. 9 State the total amount of damages which you find were sustained by Plaintiff Tammy Helmick as a result of the occurrence. In determining the total amount of damages, you should not make any reduction of the negligence, if any, of Plaintiff Joe D. Helmick.

$ 25,000.00

No. 10 Do you find that Hester Industries, Inc. breached Paragraph Fifteenth of its contract with The Potomac Edison Company

Yes ____ No X

/s/ Samuel D. Miller, Jr.
Foreman

Such verdict having been returned, it is accordingly ORDERED AND ADJUDGED, that the plaintiffs Joe D. Helmick and Tammy Helmick, shall recover of and from defendant Potomac Edison Company, the total sum of $498,232.84, plus their costs of this action.

It is further ORDERED that Potomac Edison Company shall recover nothing of defendant Hester Industries, Inc., and Hester Industries, Inc. shall recover of and from Potomac Edison Company, its cost of this action.

ENTER: July 26, 1989

/s/ John M. Hamilton
Judge

Submitted by:

/s/ Frank E. Simmerman, Jr.
FRANK E. SIMMERMAN, JR.,
Counsel for Plaintiffs

APPENDIX C

IN THE CIRCUIT COURT
OF HARDY COUNTY, WEST VIRGINIA

Civil Action 88-C-118

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs,

v.

POTOMAC EDISON COMPANY, a Maryland Corporation, and CARL BELT, INC., a Maryland Corporation, HESTER INDUSTRIES, a corporation,
Defendants.

ORDER AMENDING JUDGMENT

On this the 14th day of August, 1989, came the plaintiffs, by their counsel, Donald E. Cookman and Frank E. Simmerman, Jr., Hester Industries, Inc., by Joseph A. Wallace and Geraldine S. Roberts, and Potomac Edison Company by Clarence E. Martin, III, for hearing upon Plaintiffs' Motion for Additur for Prejudgment Interest previously served on August 2, 1989, and noticed for hearing this date.

Thereupon, Plaintiffs' Motion for Additur was presented to the Court, and predicated upon the case of *Grove v. Myers*, Supreme Court No. 18406, Plaintiffs moved for leave of Court to amend their Motion for Additur for Prejudgment Interest to allow for interest to be paid from the date of occurrence, or for thirty-three (33) months prior to entry of the jury verdict herein, July 21, 1989.

Thereupon, the Court heard arguments of counsel with respect thereto, and noted the specific objection of Potomac Edison Company that the Plaintiffs had failed to

timely seek such interest, and were precluded from seeking an Additur at this point.

After mature consideration, this Court is of the opinion that Plaintiffs' Motion for Additur for Prejudgment Interest shall be amended to award interest in accordance which such motion at Five Hundred Twenty Six Dollars and ninety-four cents ($526.94) for thirty-three (33) months, and the Plaintiffs are hereby awarded in addition to the Four Hundred Ninety Eight Thousand Two Hundred Thirty Two Dollars and eighty-four cents ($498,232.84) previously returned by jury verdict July 21, 1989, the sum of Seventeen Thousand Three Hundred Eighty Nine Dollars and two cents ($17,389.02), resulting in a total judgment which Plaintiffs Joe D. Helmick and Tammy Helmick shall recover of and from Defendant Potomac Edison Company, the sum of Five Hundred Fifteen Thousand Six Hundred Twenty One Dollars and eighty-six cents ($515,621.86), plus their costs of this action as taxed by the Clerk of the Court. Additional interest on such sums shall accrue as of August 1, 1989.

It is further ORDERED that Hester Industries, Inc. shall recover of and from Potomac Edison Company its costs of this action as taxed by the Clerk of this Court.

It is further ORDERED that a telephone conference shall be conducted September 7, 1989, at 11:30 a.m., at which time Potomac Edison Company's post-trial motions previously filed herein shall be considered. Attorney Donald E. Cookman shall initiate such conference calls.

ENTER: August 16, 1989

/s/ John M. Hamilton
HONORABLE JOHN M. HAMILTON

Submitted by:

/s/ Frank E. Simmerman Jr.
FRANK E. SIMMERMAN, JR.

APPENDIX D

IN THE CIRCUIT COURT
OF HARDY COUNTY, WEST VIRGINIA

Civil Action 88-C-118

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs,

v.

POTOMAC EDISON COMPANY, a Maryland Corporation, and CARL BELT, INC., a Maryland Corporation, HESTER INDUSTRIES, a corporation,
Defendants.

ORDER

On the 12th day of September, 1989, came the plaintiffs herein by their counsel, Frank E. Simmerman, Jr., defendant Potomac Edison by its counsel, Clarence E. Martin, III, Hester Industries, Inc. by its counsel, Joseph A. Wallace, and Carl Belt, Inc. by its counsel, Charles W. Smith, all pursuant to a telephone conference convened herein for hearing on Potomac Edison Company's Post-Trial Motions.

Having heard the arguments of counsel with respect thereto, and after mature consideration, this Court is of the opinion to and does hereby ORDER, that Potomac Edison Company's Post-Trial Motions, in their entirey, including but not limited to, Potomac Edison Company's Motion to Reimpanel the Jury, Motion to Set Aside Verdict, Motion to Set Aside Judgment and Award a New Trial, and Motion to Amend Judgment, are hereby DENIED.

Potomac Edison Company's objections and exceptions to the Court's rulings herein are expressly noted.

ENTER: Oct. 6, 1989

/s/ John M. Hamilton
JOHN M. HAMILTON
Judge

APPENDIX E

IN THE CIRCUIT COURT
OF HARDY COUNTY, WEST VIRGINIA

Civil Action 88-C-118

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs,

v.

POTOMAC EDISON COMPANY, a Maryland Corporation, and CARL BELT, INC., a Maryland Corporation, HESTER INDUSTRIES, a corporation,
Defendants.

ORDER

On the 4th day of May, 1990, came the plaintiffs, Joe D. Helmick and Tammy Helmick, in person, and by their counsel, Frank E. Simmerman, Jr. and Donald E. Cookman, defendant Hester Industries, Inc., by Joseph A. Wallace, Potomac Edison Company by Clarence E. Martin, III, and defendant Carl Belt, Inc., by Charles W. Smith for hearing on Potomac Edison Company's Motion pursuant to West Virginia Rules of Civil Procedure 60(b) and Motion to Reassemble Jurors, Set Aside the Verdict and Award a New Trial, pursuant to West Virginia Rule of Civil Procedure 60(b), both served April 27, 1990.

After mature consideration, and further noting that these matters were previously raised and ruled upon by this Court in Plaintiffs' Post-Trial Motions served July 31, 1989, and denied by this Court in its Order entered October 6, 1989, this Court hereby reaffirms its prior

Order and further ORDERS that the Motion of Defendant Potomac Edison Company pursuant to West Virginia Rule of Civil Procedure 60(b) and Motion of Defendant Potomac Edison Company to Reassemble Jurors, Set Aside the Verdict and Award a New Trial, served April 27, 1989, are each hereby denied.

This Court further ORDERS that the demands of Joe D. Helmick and Tammy Helmick, as well as Hester Industries, Inc., for their costs and expenses incurred in responding to and appearing in opposition to these renewed Post-Trial Motions are hereby denied.

The objections of each party to any and all adverse rulings are hereby noted.

It is agreed and ordered that the expiration of the time to apply for an appeal is 6 June, 1990.

Enter: 5/15/90

/s/ John M. Hamilton
HONORABLE JOHN M. HAMILTON

Submitted by:

/s/ Frank E. Simmerman, Jr.
FRANK E. SIMMERMAN, JR.

APPENDIX F

WEST VIRGINIA CODE § 23-2-6

§ 23-2-6. Exemption of contributing employers from liability.

Any employer subject to this chapter who shall subscribe and pay into the workmen's compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided, shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which such employer shall not be in default in the payment of such premiums or direct payments and shall have complied fully with all other provisions of this chapter. The continuation in the service of such employer shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have: Provided, that in case of employers not required by this chapter to subscribe and pay premiums into the workmen's compensation fund, the injured employee has remained in such employer's service with notice that his employer has elected to pay into the workmen's compensation fund the premiums provided by this chapter, or has elected to make direct payments as aforesaid. (1913, c. 10, § 22; 1915, c. 9, § 22; 1919, c. 131, § 22; Code 1923, c. 15P, § 22; 1974, c. 145.)

No. 91-265

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

POTOMAC EDISON COMPANY,
Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK, CARL BELT, INC., and HESTER INDUSTRIES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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RESPONSE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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OCTOBER TERM, 1991

No. 91-265

POTOMAC EDISON COMPANY,
Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK, CARL BELT, INC., and HESTER INDUSTRIES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

RESPONSE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent Hester Industries, Inc. respectfully submits that it supports the position of Petitioner Potomac Edison Company and prays that a writ of certiorari issue to review the opinion of the Supreme Court of Appeals of West Virginia, entered in this matter on June 27, 1991, only as it relates to the matters set forth in Petitioner Potomac Edison's Petition for a Writ of Certiorari. Due to the compelling nature of the issues raised in the Petition for a Writ of Certiorari, Respondent Hester Industries, Inc., supports Petitioner Potomac Edison in its Petition.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia, not yet reported, is reprinted in Petitioner Potomac Edison's Appendix A, at 1a-19a. The Jury Order of the Circuit Court of Hardy County, West Virginia, was entered on July 26, 1989, and is reprinted in Petitioner Potomac Edison's Appendix B at 20a-23a.

STATEMENT OF THE CASE

Petitioner Potomac Edison Company, (hereinafter "Potomac Edison"), is an electric utility that provides service in western Maryland and certain portions of Virginia and West Virginia. Hester Industries, Inc., (hereinafter "Hester"), operates a poultry processing plant in Moorefield, West Virginia. In 1984, Hester was in the process of expanding its Moorefield facilities, and retained the services of a contractor, Carl Belt, Inc., (hereinafter "Carl Belt"), to perform the renovation/construction work at its facility. Carl Belt, Inc. was an independent contractor, and Hester at no time had any control over any of the employees of Carl Belt, Inc.

Hester had contracted with Potomac Edison for additional electrical service. A power pole with electrical apparatus was placed by Potomac Edison on Hester's property. Carl Belt, Inc. discovered that the guy wire attached to the electrical power pole prevented necessary excavation around the pole. Carl Belt employees contacted Potomac Edison requesting that the guy wire be moved, but allegedly Potomac Edison refused their request. Hester was not aware of the need to move the guy wire nor was it privy to any contact between Carl Belt and Potomac Edison.

In order to complete the excavation work for which they were hired, Carl Belt's supervisors decided to remove the guywire. The guywire was removed from the pole and attached to a come-along. This attachment of the guy wire

to the come-along, provided Carl Belt the necessary means to remove the guy wire to excavate around the pole and the guy wire was so removed without incident several times.

On October 24, 1986, while respondent Joe D. Helmick (hereinafter "Helmick"), was assisting in the removal of the guy wire, an uninsulated portion of the slackened wire came into contact with an energized lightning arrester at the top of the utility pole. The guy wire became electrified, and Helmick, who was handling the wire, was electrocuted, suffering severe burns to his left forearm and soles of his feet. Later, Helmick's left arm was amputated at the elbow, as a result of his injuries.

Helmick later filed a claim for benefits with West Virginia Workers' Compensation. On September 8, 1988, Helmick received a workers' compensation award in the amount of Fifty Three Thousand Seven Hundred Sixty Dollars ($53,760.00), predicated upon a sixty percent (60%) permanent partial disability finding. This award was charged against the account of his employer, Carl Belt.

Helmick and his wife brought suit against Potomac Edison and Carl Belt, Inc. in the Circuit Court of Hardy County. Potomac Edison removed the case to United States District Court for the Northern District of West Virginia. Thereafter, Plaintiffs filed a new suit in the Circuit Court of Hardy County adding Hester as a Defendant. Helmick alleged that Potomac Edison negligently designed and constructed the utility pole. West Virginia Code § 23-2-6 provides that employers are immune from suit by an employee, unless the employee can prove that the employer acted with deliberate intent. Helmick alleged that Carl Belt wilfully and intentionally exposed him to danger, under the West Virginia "deliberate intent" statute codified at West Virginia Code § 23-4-2. The claim against Hester was premised only upon the fact that Potomac Edison alleged that Hester

owned the electrical pole, since it was located on Hester property. Potomac Edison filed a cross-claim against Carl Belt for contribution and indemnity and a cross-claim against Hester for contractual indemnity.

Prior to the trial, Helmick dismissed his claim against Carl Belt. At the close of Petitioner's case-in-chief on its cross-claims, the Circuit Court directed a verdict against Potomac Edison on its claim against Carl Belt, and directed a verdict against Potomac Edison on its contractual claim for indemnity against Hester. A special verdict form was prepared for the jury. The jury found Potomac Edison was 40% negligent and Carl Belt 60% negligent. Damages were assessed for Joe Helmick in the amount of $473,232.84 and for Tammy Helmick in the amount of $25,000.00. The jury further found that Hester did not breach Paragraph Fifteenth of its contract with Potomac Edison.

According to West Virginia law under the principles of joint and several liability and workers' compensation immunity for employers from third-party claims for contribution, the entire jury verdict was assessed against Potomac Edison, which including prejudgment interest, totalled Five Hundred Fifteen Thousand Six Hundred Twenty-One Dollars and Eighty-Six Cents ($515,621.86).

Potomac Edison filed post-trial motions seeking modification of the judgment to reduce Potomac Edison's liability to the Helmicks by 60%, proportionate to its percentage of fault as determined by the jury; a set-off of the Helmick verdict that already had been paid by workers' compensation benefits; and entry of a judgment in its favor, or a new trial on its cross-claim for contribution against Carl Belt, which were all denied by the trial court.

On September 18, 1990, the West Virginia Supreme Court of Appeals granted Potomac Edison's Petition for Appeal. Potomac Edison urged the West Virginia Su-

preme Court of Appeals to rewrite the law of contribution and indemnity, arguing that a deprivation of a third party's right to seek contribution and indemnity from a negligent employer protected by the West Virginia Workers' Compensation Act, violated the Fourteenth Amendment to the United States Constitution, as well as the West Virginia Constitution. The West Virginia Supreme Court of Appeals rejected this argument, based upon its recent ruling in *Miller v. Monongahela Power Co.*, —— W. Va. ——, 403 S.E.2d 406 (1991), *cert. pending*, No. 91-146 (July 22, 1991). In *Miller*, the Court held that the combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and (3) West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection principles. In its opinion, the West Virginia Supreme Court noted that although it did concede that Potomac Edison's argument was logical, it was reluctant to overturn one hundred years of West Virginia tort law, 403 S.E.2d at 408 (See Potomac Edison's Appendix A, at 12a). In an opinion dated June 27, 1991, the West Virginia Supreme Court of Appeals affirmed the Trial Court's judgment.

REASON FOR GRANTING THE WRIT

I. THE SYSTEM OF TORT LIABILITY TO COMPENSATE INJURED WORKERS IN WEST VIRGINIA IS VIOLATIVE OF THE FOURTEENTH AMENDMENT PRINCIPLES OF EQUAL PROTECTION AND DUE PROCESS AS APPLIED TO THIRD PARTIES.

The Supreme Court of Appeals of West Virginia has ruled in this case and in *Miller v. Monongahela Power Co.*, —— W. Va.——, 403 S.E.2d 406 (1991), *cert. pending*, No. 91-146 (July 22, 1991), that the combination of West Virginia's system of comparative negligence, West Virginia's rules on joint and several liability and West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection. These rulings by the Supreme Court of Appeals of West Virginia violate a third-party defendant's rights of due process and equal protection.

In West Virginia, under the decision of *Bowman v. Barnes*, 168 W. Va. 11, 282 S.E.2d 613 (1981), the jury is presented with a special verdict form to assess the comparative fault of a third party defendant and an employer for an injured worker's claim, even though the employer enjoys statutory immunity from liability under the Worker's Compensation Act, West Virginia Code § 23-2-6.[1]

In the instant case, the jury found the employer, Carl Belt, Inc., 60% negligent. The conclusion of the jury, is rendered meaningless because under the principles of

---

[1] The only exception to the principle of statutory employer immunity was first recognized by the Supreme Court of Appeals of West Virginia in its decision in *Mandolidis v. Elkins Industries, Inc.*, —— W. Va. ——, 246 S.E.2d 907 (1978), wherein the injured employee was successful in arguing that his employer acted with deliberate intention in exposing him to a known hazard.

joint and several liability the non-employer defendant is held responsible for the entire amount of the verdict. In essence, Potomac Edison is precluded from seeking contribution from Carl Belt, who is more negligent, and Helmick's verdict cannot be reduced to equal Potomac Edison's comparative fault.[2]

The Supreme Court of Appeals of West Virginia has endorsed a system of comparative negligence while adhering to the doctrine of joint and several liability. The result is, that a negligent third party must pay 100% of the verdict, despite the jury's finding that its percentage of comparative fault is much less. Even a 1% negligent party would have to pay all the damages awarded to an injured employee, despite the jury's determination that the employee was 10% negligent and his employer was responsible for the 89% of the total fault. *See, Miller v. Monongahela Power Co., supra.*, 403 S.E.2d at 414. The absurd result unfairly shifts the burden of liability and responsibility for the work related accident from the more culpable employer to the less culpable defendant.

As the development of tort law has vastly increased the injured worker's possible recoveries, there has also been an increasing potential for inequity as between third party and employer. This potential has fostered legislative and judicial involvement in finding an "equitable" compromise. Unfortunately, West Virginia, through its legislation and its decisions of the Supreme Court of Appeals has resolved this inequity in a manner that violates the federal constitutional guarantees of equal protection and due process. There is an overwhelming unfairness in

---

[2] The Supreme Court of Appeals of West Virginia has been consistent in its interpretation of the statutory immunity afforded to employers under the Workers' Compensation Act, West Virginia Code § 23-2-6, to preclude actions for contribution by third parties, even though that result was not expressly ordained by the West Virginia legislature. *See, Miller v. Gibson,* —— W. Va. ——, 355 S.E.2d 28, 31-32 (1987).

this resolution by the West Virginia legislature which has been interpreted and implemented by the Supreme Court of Appeals of West Virginia.

The West Virginia Supreme Court of Appeals' decision, in this case, is in direct conflict with the decisions of several other state courts of last resort which have determined that similar aspects of their own systems of tort remedies and liability are violative of the federal constitution guarantees of the Fourteenth Amendment.[3] The judicial determination by the West Virginia Supreme Court of the Workers' Compensation Act, precludes a reduction of a defendant's liability by the certain percentage the employer has been found liable. It has only been recently that the West Virginia system of tort liability modified the allowance to injured workers of duplicate recovery of workers compensation benefits plus any damages awarded at trial or obtained through settlement with an alleged third party tortfeasor.[4] *See National Fruit Product Co. v. Baltimore & Ohio R.R.*, —— W. Va. ——, 329 S.E.2d 125, at 129 n.2.

This Court has established numerous and varied tests to decide whether a particular statute violates the Equal Protection Clause of the Fourteenth Amendment in an attempt to identify guarantees under this Clause. This Court "consistently has required that legislation classify

---

[3] There are state court decisions which have followed the West Virginia Supreme Court of Appeals in rejecting the constitutional arguments presented in this case. *Williams v. White Mountain Construction Co.*, 749 P.2d 423 (Colo. 1988); *Tsarnas v. Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980).

[4] West Virginia Code § 23-2A-1, which became effective July 1, 1990, and only applies to claims arising after that date, allows a limited form of subrogation, enabling an employer to recover medical benefits paid under workers' compensation from any proceeds obtained by the employee in a third party action. This amount cannot exceed 50% of the employee's recovery from the third party, net of any attorney's fees and costs.

the person it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). This classification must "rationally advanc[e] a reasonable and identifiable governmental objective." *Id.* at 235. This Court has an obligation to view the classificatory system, in order to determine whether the disparate treatment accorded the affected classes is arbitrary. *Rinaldi v. Yeager*, 384 U.S. 305 (1966). Furthermore, if the classification is not inherently invidious or one that impinges upon a fundamental right, a state statute is to be upheld against equal protection attack, if it is rationally related to the achievement of legitimate governmental ends. *Schweiker v. Wilson*, 450 U.S. at 230.

This Court has stated "that the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980). Third party tortfeasors are not a party to the compromise achieved through workers' compensation legislation, wherein employees are given immediate benefits, regardless of fault in exchange for giving up their right to sue their employer. In West Virginia what happens to the third party tortfeasor, in this combination of workers' compensation and tort principles is that it becomes part of the scheme of mutual compromise, by giving up its rights with no gain. It is clear that the West Virginia Supreme Court of Appeals does not acknowledge the teachings of *Martinez* because this is arbitrary and irrational application of the tort system to a third party tortfeasor.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court states: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty

or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 313. This leads to the inquiry of what is the deprivation of a protected interest, if any, and if there is, what process is due. In this West Virginia tort system, the third party tortfeasor is denied access to the courts because he cannot seek contribution from the more negligent employer, nor is the injured employee's verdict reduced in a proportionate manner to the third party tortfeasor's comparative fault. This is definitely a deprivation of a right without adequate due process.

Although the Supreme Court of Appeals of West Virginia has rejected Petitioner Potomac Edison's Fourteenth Amendment arguments, other state courts of last resort have determined otherwise.

For example, in *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975), the Florida Supreme Court examined the state workers compensation law which gave both the injured employee and his employer the right to sue an alleged third party tortfeasor, "but unequally and unreciprocally the tortfeasor is precluded from suing in turn in a third-party action the employer who may be primarily liable instead of the tortfeasor for the employee's industrial accident." 310 So.2d at 7. The Florida Court concluded that the Worker's Compensation Act singled out only those alleged tortfeasors who had provided goods for services to employers involved in accidents covered by workers' compensation and such a classification was deemed arbitrary in violation of the Fourteenth Amendment's Equal Protection Clause. *Id.* at 8.[5]

The Supreme Court of Minnesota reviewed a provision of that state's worker's compensation law that "the em-

[5] The *Sunspan* decision was recently affirmed by the Florida Supreme Court in *L.M. Duncan & Sons v. City of Clearwater*, 478 So.2d 816 (Fla. 1985).

ployer shall have no liability to reimburse or hold (a third-party tortfeasor harmless on such judgments or settlements (obtained by his employee) in absence of a written agreement to do so executed prior to the injury." *Carson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 at 617 (1974). This provision of the Act was challenged on federal due process grounds by the third party tortfeasor. This legislative decision concerning the common-law right of contribution or indemnity did not pass the due process scrutiny; the Minnesota legislature had proveded no reasonable substitute for the third-party's rights nor was the legislation rationally related to a legitimate state objective. The Minnesota Court therefore held that this provision which gave immunity to employers from third-party contribution claims "violates the due process of the Fifth and Fourteenth Amendment of the United States Constitution . . .,". *Id.* at 620.

In the Ohio intermediate Court of Appeals in *Couch v. Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1371 (1985), the Court determined that a co-worker of an injured worker was protected by worker's compensation immunity from a claim for contribution by a third party tortfeasor. However, under the State system of comparative negligence the third-party should be entitled to a jury determination of the co-worker's percentage of fault and should be held liable only for his proportionate share of the total negligence contributing to the injured employee's damages. The Ohio Court found that obligating the third party to pay more than his share would violate his right to due process of law and equal protection under the law.

To be certain, there is a conflict in the law concerning the principles of federal due process and equal protection and their application to worker's compensation law concerning a third party tortfeasor's rights and remedies against a negligent employer. While some courts have rejected the constitutional arguments as has the Supreme Court of Appeals of West Virginia, others have found

these principles to be applicable. Interestingly, some of the courts that have rejected federal constitutional challength to workers' compensation immunity from third party claims for contribution have done so expressly relying on the proposition that the third party would not be subjected to joint and several liability for the employer's proportionate share of the injured party's damages.[6] *See, e.g., Williams v. White Mountain Construction Co.*, 749 P.2d 423, 428-29 (Colo. 1988). Additionally, in some comparative negligence states, the legislature or the courts have required that the immune employer's percentage of negligence be determined by the jury, and the third party's liability to the plaintiff be reduced to reflect only its proportionate share of the total fault, or reduced to reflect benefits received by the injured worker from the employer through worker's compensation benefits. *See, e.g., Runcon v. Shearer Lumber Products, Inc.*, 107 Idaho 389, 690 P.2d 324, 330-31 (1984); *Scales v. St. Louis-San Francisco Ry.*, 2 Kan. App. 2d 491, 582 P.2d 300 (1978); *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (1982); *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983).

In light of the fact that the decisions of the West Virginia Supreme Court of Appeals in this case and other similar cases is in direct conflict with other state courts of last resort reviewing these federal constitutional questions and the significance of the matters concerning the application of federal due process and equal protection principles to the statutory immunity to third party claims for contribution, the decision of the West Virginia Supreme Court of Appeals should be reviewed. For the

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[6] Eight of the forty-five states that have adopted some form of comparative negligence, whether by legislation or judicial decision, have abolished the doctrine of joint and several liability. *See*, V. Schwartz, Comparative Negligence § 16.4 (2d ed. 1986 & 1990 Supp.).

foregoing reasons, Respondent Hester Industries, Inc., submits its Brief in Support of Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia and respectfully requests that Petitioner Potomac Edison's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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(3)

No. 91-265

In The

Supreme Court of the United States

October Term, 1991

POTOMAC EDISON COMPANY,

Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK, CARL BELT, INC., and HESTER INDUSTRIES, INC.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF RESPONDENTS JOE D. HELMICK AND TAMMY HELMICK IN OPPOSITION

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QUESTION PRESENTED

Whether the combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's Rules on Joint and Several Liabilities; and (3) West Virginia's Statutory Workers' Compensation Immunity violate Federal due process and equal protection principles?

For the benefit of this Court, it should be noted that: as conceded by Potomac Edison Company, the question presented in this Petition is essentially identical to the first question presented in Monongahela Power v. Miller, Cert. Pending, No. 91-146 (filed July 22, 1991). (See Petition page 7, footnote 4.) Moreover, it should be noted that both Monongahela Power Company and Potomac Edison Power Company are wholly owned subsidiaries of Allegheny Power System, Inc. (See pages numbered ii of both Petitions 91-146 and 91-265.)

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No. 91-265

In The

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JOE D. HELMICK, TAMMY HELMICK, CARL BELT, INC., and HESTER INDUSTRIES, INC.,

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Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF RESPONDENTS JOE D. HELMICK AND TAMMY HELMICK IN OPPOSITION

PRELIMINARY STATEMENT

Through its Petition, Potomac Edison Company requests this Court exercise its discretion to review whether the combination of (1) West Virginia's system of comparative negligence; (2) West Virginia's Rules on Joint and Several Liability; and (3) West Virginia's Statutory Workers' Compensation Immunity violate due process and equal protection principles when a unanimous West Virginia Supreme Court of appeals has concluded that

this tort system does not violate the United States Constitution.

Moreover, while contending that the West Virginia Tort system is wholly arbitrary and irrational, Potomac Edison concedes that "other State and Federal Courts have rejected constitutional arguments akin to those presented by this (its) Petition." Potomac Edison Petition at 16. Potomac Edison also requests that this Court fashion a remedy when Potomac Edison has been unable to precisely describe the relief to which it claims to be entitled, and the West Virginia Supreme Court of appeals has held that "judicial intrusion into the statutory framework, particularly on so complex an issue, is unwarranted," and best left to the legislature. *National Fruit Product v. The Baltimore & Ohio R.R. Co.*, 329 S.E.2d 125 at (West Virginia, 1985). Potomac Edison's assertions notwithstanding, the issues presented by the Petition do not involve a substantial Federal question, do not present any issue appropriate for review, and Respondents Joe D. Helmick and Tammy Helmick pray that this Petition for Writ of Certiorari be denied.

OPINIONS AND ORDERS BELOW

Respondents Joe D. Helmick and Tammy Helmick accept Petitioner's statement of the applicable opinions and orders below.

JURISDICTION

The Petitioner claims that jurisdiction lies under 28 U.S.C. §1257; however, Petitioner has failed to identify any of the grounds for which Certiorari should be granted, as set forth in Rule 10 of the Rules of this Court.

STATEMENT OF THE CASE

On October 24, 1986, Respondent Joe D. Helmick was employed as a laborer by Respondent Carl Belt, Inc. On that date, Carl Belt, Inc. was performing construction work for Respondent Hester Industries, Inc. On October 24, 1986, while Respondent Helmick was assisting in the movement of a guy wire which supported a 19.9 kilovolt phase to ground terminal pole, the guy wire was electrified and Mr. Helmick suffered severe burns to his left forearm and the soles of his feet, ultimately resulting in the amputation of his left arm at the elbow.

In 1987, Mr. Helmick filed a claim for Workers' Compensation benefits against his employer, Respondent Carl Belt, Inc., and was ultimately awarded $53,760.00.

In October, 1988, Respondents Joe D. and Tammy Helmick filed the instant action against: 1) Petitioner Potomac Edison Company, alleging negligent design and construction of the terminal pole and associated guy wire; 2) Respondent Carl Belt, Inc., seeking recovery beyond Workers' compensation benefits for deliberate and intentional exposure to a known hazard; and 3) against Respondent Hester Industries, Inc. predicated upon Potomac Edison Company's prior assertion that

Hester Industries, Inc. owned the subject terminal pole and guy wire and was thus responsible for design and/or construction defects.

As conceded by Potomac Edison Company, West Virginia's Workers' Compensation laws do allow both employees and Third party tort-feasors to pursue employers directly, or for contribution, in limited circumstances. Specifically, if the employee and/or third party can meet the burden of proof imposed by *Mandolidis v. Elkins Industries, Inc.*, ___ W. Va. ___, 246 S.E.2d 907 (1978), and its progeny.

Prior to trial, the Helmicks dismissed their *Mandolidis* claim against Respondent Carl Belt; however, Petitioner Potomac Edison continued to assert its cross-claim for contribution and indemnification against Carl Belt, Inc., predicated upon, among others, *Mandolidis* grounds.

According to the pleadings, the order of proof was Plaintiffs Joe D. Helmick and Tammy Helmick, followed by Potomac Edison Company, to be followed by Carl Belt, Inc. and Hester Industries, Inc.

At the conclusion of Potomac Edison's case, Carl Belt, Inc., through counsel, moved for the entry of a directed verdict predicated upon Potomac Edison Company's failure to meet the burdens of proof established under *Mandolidis*. In response to the Motion for Directed Verdict, Potomac Edison Company, through its counsel, strenuously argued that it had met the requisite *Mandolidis* burden. Potomac Edison failed to assert at trial that dismissal of its claims for contribution against Carl Belt, Inc. would result in the deprivation of any constitutionally protected right. (The issue raised in the Petition). The

trial court concluded that Potomac Edison had failed to meet its burden of proof and Respondent Carl Belt, Inc. was granted a directed verdict as to all claims theretofore asserted by Potomac Edison.

Consistent with the general rules of comparative negligence, and the holdings of *Bowman v. Barnes*, 168 W. Va. 11, 282 S.E.2d 613 (1981), juries in West Virginia are required to assess fault among all parties proximately contributing to causation. Accordingly, the jury was given a special verdict form which directed it to determine the negligence, if any, of the parties to the accident, Joe D. Helmick, Potomac Edison, Inc., and Carl Belt, Inc. The jury concluded that Joe D. Helmick had not been negligent; however, both Potomac Edison Company and Carl Belt, Inc. were guilty of negligence which proximately caused the accident. The jury then assigned unto Potomac Edison Company, 40% of the negligence which had proximately caused the accident and assigned unto Carl Belt, Inc., 60% of all negligence. Notably, Carl Belt, Inc. had offered no evidence, had not been present nor represented at argument, and the assignment to Carl Belt, Inc. was an assignment to an "empty chair" defendant. The jury further found that Hester Industries, Inc., did not breach Paragraph Fifteenth of its contract with Potomac Edison, Inc. and consistent with West Virginia law under the Principles of Joint and Several Liability, the entire verdict was assessed against Petitioner Potomac Edison, Inc., which including pre-judgment interest, totalled $515,621.86.

Thereafter, through a series of post-trial motions, Potomac Edison Company first asserted its claim that dismissal of its claim for contribution against Carl Belt, Inc.

constituted a deprivation of Federal constitutional protections. Each and every post-trial motion filed on behalf of Potomac Edison Company was denied by the Circuit Court of Hampshire County.

On September 18, 1990, the West Virginia Supreme Court of Appeals granted Potomac Edison's Petition for Appeal, and the instant claims of deprivation of constitutional protections were among the nine various errors assigned by Potomac Edison. Potomac Edison Company invited the West Virginia Supreme Court of Appeals to rewrite the laws of contribution and indemnity, arguing that deprivation of Potomac Edison's right to seek contribution from Carl Belt, Inc. violated the Fourteenth Amendment to the United States Constitution, as well as the West Virginia Constitution. In an opinion dated June 27, 1991, the West Virginia Supreme Court of Appeals *unanimously* rejected this argument, relying upon its recent ruling in *Miller v. Monongahela Power Company*, ___ W. Va. ___, 403 S.E.2d 406 (1991), Cert. Pending, No. 91-146 (July 22, 1991).

In *Miller*, the West Virginia Supreme Court held that the combination of: (1) West Virginia's System of Comparative Negligence; (2) West Virginia's Rules on Joint and Several Liability; and (3) West Virginia's Statutory Workers' Compensation Immunity does not violate Federal due process and equal protection principles.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari does not even allege that this case satisfies the criteria specified in Rule

10 for review by this Court. There is no allegation that the West Virginia Supreme Court of Appeals' decision in *Miller* or *Helmick* is in conflict with any other decision construing West Virginia's System of Comparative Negligence, coupled with West Virginia's Rules on Joint and Several Liability and West Virginia's Statutory Workers' Compensation Immunity.

As conceded in the instant Petition at page 16, "Other State and Federal courts have rejected constitutional arguments akin those presented by this Petition."

The Petition does not identify any important question of law which has not been, but which should be settled by this Court. Instead, the Petition reveals that Potomac Edison Company is simply dissatisfied with the imposition of liability imposed under established State law tort principles by the Circuit Court of Hampshire County and a unanimous West Virginia Supreme Court of Appeals. The decisions of these courts were correct and need not be reviewed by this Court.

I. The Petition Should Be Denied Because West Virginia's System Of Comparative Negligence, Combined With West Virginia's Rules On Joint And Several Liability, And West Virginia's Statutory Workers' Compensation Immunity Constitute A System Of State Law Tort Principles Which Are Not Wholly Arbitrary Or Irrational And Which Do Not Violate Fourteenth Amendment Principles.

This Court has stated "that the State's interest in fashioning its own rules of tort law is paramount to any discernible Federal interest, except perhaps to an interest

in protecting the individual citizen from State action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980).

Only one of the cases which Petitioner cites as supporting its position, *Carlson v. Smogard*, 215 N.W.2d 615 (1974), purports to be controlled by constitutional principles, although the Court there relied on both State and Federal constitutional provisions in a most conclusory manner. The other cases cited by the Potomac Edison Company turn on statutory interpretations, *Couch v. Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985), *Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788 (Ky. 1969), or contractual and state constitutional provisions, *L.M. Duncan & Sons v. City of Clearwater*, 478 So.2d 816 (Fla. 1985) and *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975).

Contrary to Potomac Edison Company's assertions, West Virginia's tort and Workers' Compensation systems of Joint and several liability and employer immunity is not unique to West Virginia. Similar tort principles exist throughout America without violating constitutional standards. *Hudson v. Union Carbide Corp.*, 620 F. Supp. 558 (N.D. Ga. 1985); *Raisler v. Burlington Northern R.R. Co.*, 219 Mont. 254, 717 P.2d 535 (1985); *Tsarnas v. Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980); *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 290 N.W.2d 276 (1980).

This Court has previously considered virtually the same issues as those presented in this action in *Atlantic Coast Line R.R. Co. v. Erie Lackawanna R.R. Co.*, 406 U.S.

340 (1972) (per curiam), and *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), where this Court refused to allow third-party tort-feasors to obtain contribution from employers who were covered by the limitation of liability provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950). In *Lockheed Aircraft Corporation v. United States*, 460 U.S. 190 (1983) and in *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963), cited by the Petitioner, the issue of third-party indemnity was resolved solely on the basis of statutory interpretation to permit the indemnity claims by the third party against the employer. The issue of limiting third-party claims against employers was also before this Court in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) in which the plaintiff was injured when the ejection seat of a jet fighter malfunctioned during flight, permanently injuring the pilot. The pilot sued Stencel, the manufacturer of the ejection system, for negligence. Stencel cross-claimed against the United States for indemnity. Stencel claimed it was passively negligent while the government's active negligence caused the injuries. The pilot, like Helmick in this action, had received compensation. This Court dismissed Stencel's third-party claims under the limitation of liability provision of *Feres v. United States*, 340 U.S. 135 (1950), which immunizes the United States from a claim asserted by a member of the military, which is essentially identical to the immunity of the employer (Carl Belt) in the state of West Virginia from a claim asserted by an employee (Helmick).

West Virginia maintains a comprehensive system of Workers' Compensation which includes the balancing of

interests of the employee, employer and third parties. Besides granting recovery to employees against non-negligent employers and denying contribution claims grounded in negligence by third parties against employers, the system also provides protection for third-party tort-feasors by precluding employers from recovering Workers' Compensation benefits paid to employees injured by negligent third parties, all as part of the quid pro quo in the balancing of the competing interests of the employee, employer and third parties. *Lockheed, supra,* at 198. *National Fruit Product Co. v. Baltimore & Ohio R.R. Co.*, ___ W. Va. ___, 329 S.E.2d 125 (1985) and *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co.*, 115 F.2d 277, 282 (4th Cir.), cert. denied, 312 U.S. 702 (1940). It is imperative to note that both employees and third parties are afforded the identical right to recover from an employer either directly or by contribution, providing the claim is based upon an injury from conduct rising to a standard of deliberate intent. *Sydenstricker,* 288 S.E.2d at 511; W. Va. Code § 23-4-2 (Supp. 1991). Also included within this comprehensive statutory scheme is West Virginia's treatment of the receipt of Workers' Compensation benefits as a collateral source as it relates to third-party tort-feasors. See *Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). Petitioner's argument is merely a veiled attempt to avoid the collateral source rule as established and applied in West Virginia.

Finally, this Court is directed to page 132 of *National Fruit Product Co. v. Baltimore & Ohio R.R. Co., supra,* where the West Virginia Supreme Court of Appeals was urged to recognize the reciprocal cause of action now sought by Petitioner, to-wit: to allow an employer to recover

Workers' Compensation benefits from a negligent third party. In *National Fruit*, the West Virginia Supreme Court declined to allow such recovery, ultimately stating that:

> "We have traditionally stated that our Workers' Compensation System is entirely a statutory creature and for this reason we feel that judicial intrusion into the statutory framework, particularly on so complex an issue, is unwarranted. Subrogation statutes are of necessity extremely complex and detailed because they must be designed to anticipate all of the multifaceted problems that may occur." 329, S.E.2d, at 132

The West Virginia Supreme Court then identified *some* of the issues and problems which would be raised, and identified problem areas affecting Workers' Compensation immunity, joint and several liability, contribution, subrogation, mitigation of damages and standing, among others. See *National Fruit Products Co., supra*, at 132, note 5.

Like the West Virginia Supreme Court of Appeals, this Court should decline to exercise judicial intrusion into such complex statutory framework and the instant Petition should be denied.

II. The Petition Should Be Denied Because The Transparency Of Potomac Edison's Argument That West Virginia's Tort System Is Wholly Arbitrary Or Irrational Is Best Illustrated By The Facts That Hester Industries, Inc., Through Its Counsel, Has, *In These Proceedings*, Made Equally Compelling Arguments That The West Virginia Tort Principles Under Consideration Are Both Constitutional And Unconstitutional.

On or about September 5, 1991, Hester Industries, Inc., through its Counsel, filed its Response Brief In

Support Of Petition For a Writ of Certiorari, arguing that "The system of tort liability to compensate injured workers in West Virginia is violative of the Fourteenth Amendment principles of equal protection and due process as applied to third parties." In its brief, Hester fails to disclose that on or about July 17, 1990, in Defendant Hester Industries' Response to Defendant Potomac Edison's Petition for Appeal, Hester Industries, Inc. contended that "Denial of contribution to Potomac Edison does not constitute a denial of its constitutional rights."[1]

Although Counsel for Hester Industries, Inc. appears to have forgotten the position it previously urged upon the West Virginia Supreme Court of appeals, this Court is directed to pages 9-14 of the Appendix hereto wherein Hester Industries, Inc. makes a compelling argument for the constitutionality of the West Virginia tort system, *then distinguishing many of the cases it now relies upon*. Although it may be subject to argument, it is submitted that if the West Virginia tort system were *wholly irrational* or *arbitrary*, counsel could not advance such inconsistent arguments in good faith.

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[1] See page 5, heading "Issues", subparagraph numbered 2. of Defendant Hester Industries' Response to Defendant Potomac Edison's Petition for Appeal, reprinted in full text in the Appendix hereto.

CONCLUSION

For the foregoing reasons, Respondents Joe D. Helmick and Tammy Helmick respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON

JOE D. HELMICK and
TAMMY HELMICK,

Plaintiffs,

vs.

POTOMAC EDISON COMPANY,
a Maryland corporation,
HESTER INDUSTRIES, INC.,
a West Virginia corporation,
and CARL BELT, INC., a
Maryland corporation,

Defendants.

(Circuit Court of
Hardy County
County
No. 88-C-118)
NO. _____

DEFENDANT HESTER INDUSTRIES RESPONSE TO DEFENDANT POTOMAC EDISON'S PETITION FOR APPEAL

WALLACE, ROSS AND GIBSON

By: /s/ Joseph A. Wallace
Joseph A. Wallace

/s/ Geraldine S. Roberts
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P. O. Box 1669
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Counsel for Defendant,
Hester Industries, Inc.

I. NATURE OF PROCEEDINGS AND RULINGS BELOW

1. The defendant, Hester Industries (hereinafter Hester) opposes defendant Potomac Edison's petition for reversal of the final order of the Circuit Court of Hardy County in this action.

2. This action was originally filed by the Plaintiffs solely against Potomac Edison. In their answers to interrogatories, Potomac Edison alleged that Hester owned the utility pole in question, which resulted in the Plaintiffs amending their complaint to add Hester as a defendant, in Hardy County Circuit Court, not Federal Court, as stated by Potomac Edison in its request for appeal.

3. Prior to trial, the Plaintiffs dismissed their claim against Carl Belt, Inc. At trial, the judge dismissed Potomac Edison's cross-claim against Carl Belt, Inc. at the close of testimony. All claims against Hester were dismissed except for the contract indemnification issue. *See* Trial Transcript pp. 548 and 575.

4. On the issue of whether Hester Industries was liable under the indemnification clause of its contract with Potomac Edison, the jury found that Hester Industries was not liable. In its verdict form the jury found that Carl Belt was 60% (sixty percent) negligent, and Potomac Edison was 40% (forty-percent) negligent.

5. Because there was insufficient evidence to hold Carl Belt liable for *Mandolidis*-type negligence, the court denied Potomac Edison's request for contribution against Carl Belt.

6. Approximately nine months after trial, Potomac Edison sent out an investigator to interview members of the jury. Based on the information uncovered at that time, Potomac Edison requested that the judge reimpanel the jury. This motion was denied.

II. STATEMENT OF FACTS

The accident from which this action arose occurred on October 24, 1986, when employees of Carl Belt, Inc. were performing work on Hester Industries property. Carl Belt, Inc. was an independant contractor expanding Hester facilities in Moorefield, West Virginia. The work involved digging a ditch near a building. A guy wire to an electrical pole, which had been installed by Potomac Edison, was obstructing the work of Carl Belt. Carl Belt's supervisors had contacted Potomac Edison twice unsucessfully to move the guy wire, and therefore decided to move the guy wire themselves, without the knowledge of Hester Industries. While moving this guy wire, the wire came in contact with charged electrical apparatus at the top of the pole, which resulted in the injury to Joe Helmick.

The pole to which the guy wire was attached had been installed by Potomac Edison prior to October 24, 1986, pursuant to a request by Hester Industries, for electrical service. Location and design of the pole were determined solely by Potomac Edison. The agreement between Hester Industries and Potomac Edison was a standard electrical service agreement produced by Potomac Edison. The agreement included an indemnification

clause, and a clear recitation that Potomac Edison owned all poles and equipment. *See* Exhibit A.

In its Answer, Potomac Edison alleged that Hester Industries owned said pole, which Potomac Edison argues should relieve Potomac Edison of any liability concerning the installation of the pole. At trial, the issue of pole ownership was argued by Potomac Edison without supporting evidence. Potomac Edison also argued that their customer had insulated it from liability by executing the required service agreement which contained paragraph seven, the indemnification clause and paragraph fifteen, the removal or tampering clause. The Circuit Court directed a verdict on the indemnification issue. The other issue under the electrical service agreement was submitted to the jury, which found that Hester was not negligent and paragraph fifteen would therefore not apply.

At jury selection held prior to trial, extensive voir dire was conducted by counsel for all parties in the case, including Potomac Edison. The questions now alleged by Potomac Edison to require a new trial were never asked during voir dire. *See* Transcript of Voir Dire.

Discovery cut-off in this case was July 3, 1989 and the jury was selected on July 10, 1989. Potomac Edison did not reveal its expert witness, despite prior requests for disclosure of witnesses (*see* Exhibit B, Interrogatory to Potomac Edison No. 23), until approximately noon on Sunday, July 16, 1989 with opening statements scheduled for 9:00 A.M. the following day. The Plaintiffs' Motion in Limine to exclude the testimony of Potomac Edison's expert was granted by the Circuit Court.

On July 14, 1989, two (2) days before trial and thirteen (13) days after discovery cut-off, Potomac Edison filed an Amended Complaint raising the indemnification issue for the first time. The trial court permitted the untimely raising of this issue over Hester's objection. Nevertheless, the jury resolved this matter in Hester's favor.

III. ISSUES

1. The circuit court had adequate basis for directing a verdict in favor of Carl Belt as to Potomac Edison's cross-claim for indemnification and contribution.

2. Denial of contribution to Potomac Edison does not constitute a denial of its constitutional rights.

3. The circuit court did not err in refusing to allow contribution by Potomac Edison against Carl Belt.

4. The circuit court did not err in granting Hester's motion for a directed verdict on Potomac Edison's cross-claim for indemnification based upon the contract entered into between Hester and Potomac Edison.

5. The circuit court did not err in not allowing John St. Clair, an expert witness for Potomac Edison, to testify.

6. The circuit court properly allowed Clarence E. Jones, Ph.D., to testify as an expert witness in the trial of this matter

7. The failure of the trial court to reduce the amount of damages awarded the plaintiffs by the jury because the plaintiffs failed to mitigate their damages is not grounds for awarding a new trial.

8. This Defendant takes no position with the trial court's ruling in admitting the photographs of plaintiff's injuries.

9. The trial court did not err in refusing to grant defendant, Potomac Edison a new trial on the basis of alleged concealment of information by jurors.

IV. DISCUSSION

1. The circuit court had adequate basis for directing a verdict in favor of Carl Belt as to Potomac Edison's cross-claim for indemnification and contribution.

Potomac Edison argues that the trial court improperly dismissed its cross-claim against Defendant Carl Belt, and that sufficient facts had been established to show that Carl Belt met the deliberate intent requirement to maintain a common law action against a workers' compensation employer under *Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 246 S.E. 2d 907 (1978). *Mandolidis* allows an employee to recover against his employer in a common law negligence action if the employee can prove that the employer acted in a "willful, wanton, or reckless" manner. In *Cline v. Joy Mfg. Co.*, 310 S.E. 2d 835 (W. Va. 1983), the court further developed the test for deliberate intent, requiring that the employer have had knowledge and appreciation" of the high degree of risk. In 1983, the West Virginia Legislature reacted to the *Mandolidis* cases and passed the *Mandolidis* reform of the Workers' Compensation Act. *W. Va. Code* § 23-4-3 (1983). The amendments raised the level of proof required to find an employer liable for "deliberate intent". Under the

Mandolidis reform, a plaintiff must establish five specific facts in order to prevail. These are (1) an unsafe workplace which presented a high degree of risk and a strong probability of serious injury or death, (2) that the employer had a *subjective* realization of the risk, (3) that the risk was a violation of a specific statute or safety standard, (4) that despite such knowledge, the employer deliberately exposed the employee to such degree of risk, and (5) that the employee suffered serious injury or death as a direct result of the exposure. *W. Va. Code* § 23-4-3(c)(2)(ii). The statute also provides that a trial court may direct a verdict against the plaintiff, if there is insufficient evidence to find that all the facts were proven. *W. Va. Code* § 23-4-3(c)(2)(iii)(B).

The accident in the present action occurred in October, 1986, therefore, the proper standard to determine whether an action may be maintained action the workers' compensation employer is the reform statute, and not merely *Mandolidis* negligence as alleged by Potomac Edison. In the present action, the claim by the Plaintiff against Carl Belt was dropped prior to trial, after the completion of discovery, because of insufficient evidence to prove all the requirements of the statute. At trial, Carl Belt moved for a directed verdict at the close of evidence. A directed verdict in a *Mandolidis* action is allowed under *West Virginia Code* § 23-4-2(c)(2)(iii)(B). Construing this code section in a diversity action, the Federal District Court for the Southern District of West Virginia held in *Handley v. Union Carbide Corp.*, 620 F. Supp. 428 (S.D. W. Va. 1988) that if there is insufficient evidence on any of the five points required under the statute, a directed verdict is proper.

The trial court set out its specific findings concerning the evidence regarding Carl Belt. (*See* trial transcript at pages 462-64.) It is clear from the transcript that the trial judge knew and applied the appropriate standard in viewing the evidence and granting a directed verdict in favor of Carl Belt.

In order for a third-party tortfeasor to obtain contribution against an otherwise-immune workers' compensation employer, the third-party must establish the same facts as a plaintiff in such an action. *Miller v. Gibson*, 355 S.E. 2d 28 (W. Va. 1987). While *Miller* was determined on the Mandolidis-Cline standard, that standard is at least as strict as the one established by the West Virginia Legislature in its reform. As the trial court properly dismissed Carl Belt at the close of evidence, Potomac Edison may not have contribution against Carl Belt, and therefore is liable for the entire amount of the jury verdict.

2. Denial of contribution to Potomac Edison does not constitute a denial of its constitutional rights.

Potomac Edison argues that it is unconstitutional to refuse to allow contribution against Carl Belt. The standard of review proposed by Potomac Edison is strict scrutiny, alleging that the court's action violated a fundamental right or a involved suspect classification. This is clearly wrong. The United States Supreme Court has established specific suspect classifications which subject a statute to strict scrutiny: race, religion, sex, or alienage.[1]

[1] Potomac Edison has cited *McLaughlin v. Florida*, 379 U.S. 184 (1964), as authority for invoking strict scrutiny. This case

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16A *Am. Jur. 2d, Constitutional Law* § 750 at 816. While Potomac Edison is a corporate entity and does not fit any of these classifications. Fundamental rights which will invoke strict scrutiny include the right to procreation, the right to marry, and First Amendment rights including freedom of speech, freedom of assembly, freedom of the press, the right to interstate travel, and the right to vote.[2] *16A Am. Jur. 2d, Constitutional Law* § 750 at 819. While legislatures may not confer rights on corporations which are not available to individuals, corporations may be classified as the legislature sees fit, without violating the Fourteenth Amendment. 16A *Am. Jur. 2d, Constitutional Law* § 777. *Sunspan Engineering & Construction Co. v. Spring-lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975), cited by Potomac Edison as the basis of its constitutional claim, is factually distinguishable from the present case. The Florida statute which was held to be unconstitutional in *Sunspan* allowed employers to recover from negligent third parties, but did not allow contribution against employers. *Sunspan* has been distinguished by federal district courts construing the Pennsylvania and Colorado Workers' Compensation Acts. *See Albrecht v. Pneuco*

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involved a challenge to a statute which prohibited co-habitation between mixed-race couples and is clearly distinguished from the facts in the present case.

[2] Access to the courts may be a fundamental right, but it does not invoke strict scrutiny in this instance. In the case cited by Potomac Edison, *Bankers Life & Casualty Co. v. Crenshaw*, 468 U.S. 71 (1988), the Supreme Court denied the appeal of an insurance company which was challenging a state statute which allowed for the imposition of punitive damages on equal protection grounds.

Machinery Co., 448 F. Supp. 851 (E.D. Pa., 1978) and *Greer v. Intercole Automation, Inc.*, 553 F. Supp.275 (D. Co. 1982). It is also clearly distinguishable from the West Virginia law which grants only the employee the right to sue a third-party tortfeasors. *Jones v. Laird Foundation*, 156 W. Va. 479, 195 S.E. 2d 821 at 828 (1973). The employer does not have a right to recover its loss from a negligent third-party. *National Fruit Product Co. Inc. v. Baltimore & Ohio Railroad Co.*, 329 S.E. 2d 125 (W. Va. 1985). Additionally, West Virginia does permit the third-party tortfeasor to have contribution against the employer if the negligent third-party can prove Mandolidis negligence against the employer. *Miller v. Gibson*, 355 S.E.2d 28 (W. Va. 1985).

In the present case, the trial court followed the language of the Workers' Compensation statute as interpreted by the West Virginia Supreme Court in denying contribution for Carl Belt. Any third party tortfeasor, individual or corporation is held to the same standard of proof to recover from a covered employer. The Court has noted in *National Fruit Product v. Baltimore & O.R. Co.*, 329 S.E. 2d 125 at 129, n.2 (W. Va. 1985), that while this allows a windfall for the injured employee, any change must be enacted by the Legislature. (*Citing Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E. 2d 821 at 828 (1973) (J. Sprouse, concurring), which further states that "it is not for this Court to compound the inequity by permitting the negligent physician the protection for a government umbrella with the employer footing the bill.") The holding in *Jones v. Appalachian Power Co.*, 145 W. Va. 478, 115 S.E. 2d 129 (1960), is similar. There the Court held that "[t]he amount of compensation received for injury or death from Workmen's Compensation Fund is not a

proper subject for a remittitur in an action by the injured person, . . . , against a third party responsible for his injury. . . . " *Jones*, 115 S.E. 2d 129, Syllabus Point 3.

As there is no basis to invoke strict scrutiny, the statute need only pass the rational basis test. 16A *Am. Jur 2d, Constitutional Law* §752. The purpose of Workers' Compensation is to insure that an injured employee is compensated for his job-related injury. In exchange the subscribing employer is given immunity from suit, except in cases which fall under the *Mandolidis* reform statute. *W. Va. Code* §§23-2-8, and 23-4-2. This immunity was necessary to withstand constitutional challenges when Workers' Compensation was first enacted, and is clearly a rational basis on which to uphold the statutory immunity granted to complying employers. *See New York Central Railroad Co. v. White*, 243 U.S. 188 (1917).

3. The circuit court did not err in refusing to allow contribution by Potomac Edison against Carl Belt.

Because workers' compensation benefits are a legislative exclusive remedy, contribution is available against an employer only if the employee or the third-party tortfeasor can prove the five factors under the *Mandolidis* reform. The West Virginia Supreme Court of Appeals addressed the specific issue of recovery of the entire verdict against one tortfeasor, despite allocation of percentage of negligence and workers' compensation immunity, in *Riggle v. Allied Chemical*, 378 S.E.2d 2d 282 (W. Va. 1989). At trial, the jury returned a verdict for the plaintiffs, and apportioned causation between the two remaining defendants. The trial court had dismissed the

Mandolidis action against the employer, and assessed the entire amount of the judgment against the remaining defendant. *Riggle*, 378 S.E. 2d at 285. The court later assessed the employer in the defendant's cross-claim, but there was a *Mary Carter agreement* and a *contractual indemnity agreement* between the co-defendants. *Id* at 286 and 288.

The assessment in *Riggle* is identical to the present case. The claim against Carl Belt was dismissed by the trial court for insufficient evidence to uphold a Mandolidis action, yet left in because of Potomac Edison's cross-claim. The jury awarded damages to the plaintiffs, and assessed negligence against the parties. In the trial court's final order it noted that the Plaintiffs could recover against Potomac Edison and, because Carl Belt had been dismissed on the Mandolidis action, it was not liable to Potomac Edison for contribution. *See* Trial transcript at 596-97.

Potomac Edison proposes to allow an offset to the third-party tortfeasor for the amount of workers' compensation benefits or the percentage of negligence assessed against the employer, whichever is less. This is clearly against precedent and the purpose of workers' compensation. *See Jones v. Appalachian Power Co.*, 145 W. Va. 478, 115 S.E. 2d 129 (1960). The Workers' Compensation statute is a trade-off. The employee gives up any right of action against his employer in exchange for a statutory right to be compensated for on the job injuries, absent *Mandolidis* negligence on the part of the employer. *W. Va. Code* §§23-2-6, and 23-4-2.

Workers' compensation is not a complete recovery. The Act completely covers medical expenses, but only compensates the employee partially for his lost wages. There is no recovery for pain and suffering, mental anguish, or loss of consortium. *Jones v. Laird Foundation*, 195 S.E. 2d, 821 at 827-28. The Court has held that a negligent tortfeasor may not have a set-off in the amount of a workers' compensation recovery, as this would serve to excuse the third-party. *Id.* at 828. Potomac Edison would like to apportion the set-off between the Plaintiff and his wife. While Tammy Helmick's claim for loss of consortium is derivative of her husband's action, she has had no recovery from Workers' Compensation. Potomac Edison claims that the dissent in *Mooney v. Eastern Associated Coal* supports this type of set-off, *Mooney* should be distinguished from the present case in that *Mooney* concerned a claim by a widow of an employee, who was entitled to death benefits under workers' compensation. *Mooney v. Eastern Associated Coal Corp.*, 326 S.E. 2d 427 (W. Va. 1984).

The Court has held as recently as 1985 that any contribution between employers and third-party tortfeasors must be legislatively enacted. *National Fruit Product Co. Inc. v. Baltimore & Ohio Railroad*, 329 S.E. 2d 125 (W. Va. 1985). In view of the protection which the Workers' Compensation Act offers both employees and non-negligent employers, the Court should not change its position now.

4. The circuit court did not err in granting Hester's motion for a directed verdict on Potomac Edison's cross-claim for indemnification based upon the contract entered into between Hester and Potomac Edison.

Potomac Edison contends that it was inappropriate for the court to grant Hester's motion for a directed verdict on Potomac Edison's cross-claim for indemnification. The basis of said cross-claim is the Electric Service Agreement dated December 1, 1982, between Hester and Potomac Edison. (*See* Exhibit A).

Following the close of Potomac Edison's evidence, the circuit court directed a verdict in favor of Hester with regard to paragraph seven of the Electric Service Agreement. Paragraph seven provides in pertinent part as follows:

> . . . the Customer [Hester] agrees to at all times indemnify and save harmless the Company [Potomac Edison] from and against all claims, demands, suits, actions and judgments and from and against all costs, expenses, pecuniary or other loss that may arise out of any damage, injury or loss of or to person, life and (or) property caused by any act or omission of the Customer, its agents, servants and employees, . . .

It is well settled that where, from the evidence, only one inference may be reasonably drawn, it is the imperative duty of the court as a matter of law to direct a verdict. Where a motion for a directed verdict is made by a party at the trial of a case, all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed and the

court must assume as true those facts which the jury may properly find from the evidence. *Prager v. Meckling*, 310 S.E.2d 852 (W. Va. 1983); *Cook v. Heck's Inc.*, 342 S.E.2d 453 (W. Va. 1986); *McGuire Oil Co. v. Ellis*, 377 S.E.2d 460 (W. Va. 1988).

Before the indemnification clause of the Electric Service Agreement would be enforceable, there must be a showing of negligence on the part of Hester. It is only then that Hester would have the duty to indemnify Potomac Edison.

The rule is that when the evidence does not prima facie entitle a party to recover, the motion to direct a verdict for the moving party should be sustained. *Hinkle v. Martin*, 163 W.Va. 482, 256 S.E.2d 786 (1979). It is clear that Potomac Edison failed to establish a prima facie right to recover under the indemnification clause of the Electric Service Agreement. Where a party is not entitled to recover under any view of the evidence as is here with Potomac Edison, a verdict should be directed for the adverse party, Hester. *Mountaineer Contractors v. Mountain State Mack, Inc.*, 160 W. Va. 292, 268 S.E.2d 886 (1980); *Delp v. Itmann Coal Company*, 342 S.E.2d 219 (W. Va. 1986).

5. The circuit court did not err in refusing to allow John St. Clair, an expert witness for Potomac Edison, to testify.

On May 22, 1989, the circuit court entered an Order directing that all discovery shall be completed on or before July 3, 1989. On March 15, 1989, Potomac Edison filed its Answers to Hester's First Set of Interrogatories wherein the response was that Potomac Edison had not

retained any experts. (See Exhibit B). On July 10, 1989, following the conclusion of discovery, Potomac Edison filed a Supplemental Answer to Hester's Interrogatory No. 23, wherein E. William Johnson, an economist and Stephen M. Townsend, a psychologist, were disclosed as expert witnesses. (See Exhibit C). Even at this time, Potomac Edison still failed to disclose John St. Clair as an expert witness. On Sunday, July 16, 1989, at approximately noon, the day before the trial was to begin, Potomac Edison disclosed John St. Clair as an expert witness via a fax message. During the course of the presentation of Potomac Edison's evidence, counsel called John St. Clair as a witness. The circuit court would not permit his testimony because of the late disclosure. (See Trial Transcript 425-426).

Under Rule 26(b)(4)(A)(i), West Virginia Rules of Civil Procedure, a party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when that party has determined *within a reasonable time before trial* who his expert witnesses will be. *Michael v. Henry*, 354 S.E.2d 590 (1987), (emphasis added). There is no argument that would support the position that counsel for Potomac Edison's disclosure of John St. Clair as an expert witness was made within a reasonable time before trial. Furthermore, it is ludicrous for counsel for Potomac Edison to contend that this expert witness was made available for deposition when his identity was made known less than twenty-four hours before the commencement of trial.

Rule 26(e)(1)(B), West Virginia Rules of Civil Procedure, provides in pertinent part:

> (e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty reasonably to supplement his response with respect to any question directly addressed to:
>
> * * *
>
> (B) The identify of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

This Rule provides for sanctions for failure to comply with a discovery request, regarding subsequently obtained information, as part of the court's inherent power to impose sanctions in carrying out its obligation to conduct a fair and orderly trial. *Prager v. Meckling*, 310 S.E.2d 852 (W. Va. 1983).

The circuit court, in its inherent power, would not allow the testimony of John St. Clair inasmuch as Potomac Edison had failed to supplement its responses to discovery requests in a timely manner and disclose this witness. Unlike the facts in *Hulmes v. Catterson*, 388 S.E.2d 318 (W. Va. 1989), where a pretrial conference and a trial date had not been set, a jury had been selected and the trial in this matter was to begin the next day.

Additionally, Potomac Edison had failed to obey the circuit court's order setting a discovery deadline of July 3, 1989. Rule 37(b), West Virginia Rules of Civil Procedure, provides that if a party fails to obey an order with regard

to discovery, the circuit court may impose sanctions. In this case, the circuit court refused to allow Potomac Edison to introduce evidence through the testimony of its expert witness, John St. Clair. The imposition of sanctions by a circuit court under Rule 37(b), West Virginia Rules of Civil Procedure, is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion. *Bell v. Inland Mutual Insurance Co.*, 332 S.E.2d 127 (W. Va.), *cert denied* 474 U.S. 936 (1985). Potomac Edison has failed to show an abuse of discretion by the circuit court.

The circuit court's action in disallowing the testimony of John St. Clair on behalf of Potomac Edison was appropriate and should not be disturbed.

6. The circuit court properly allowed Clarence E. Jones, Ph.D., to testify as an expert witness in the trial of this matter.

Potomac Edison contends that the Plaintiff's expert, Clarence E. Jones, should not have been permitted to testify as an expert witness.

Rule 702, West Virginia Rules of Evidence, allows the use of expert witnesses to " . . . assist the trier of fact to understand the evidence or to determine a fact in issue, . . . " The test in West Virginia to determine whether a witness qualifies as an expert is whether the witness is shown through training, education, or practical experience to possess significant skill and knowledge regarding the technical subject. Cleckley, *Handbook on Evidence* § 71(B).

Before an expert opinion is admissible, a foundation must be laid wherein the expert's qualifications must be demonstrated to the court. As to the question of a witness's qualification as an expert, it lies largely in the discretion of the trial court, whose judgment is not to be reversed, unless it clearly appears that the witness is not qualified. *Moore, et al. v. Shannondale, Inc.*, 152 W. Va. 549, 165 S.E.2d 113 (1968). The trial court has broad discretion in the matter of admission or exclusion of expert testimony and the ruling will be sustained unless it is manifestly erroneous. *Salem v. United States Mine Co.*, 370 U.S. 31 (1962). This court in *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932), stated that the question of qualification of a witness as an expert rests largely in the discretion of the trial court, there being no arbitrary and fixed test of such qualification. It is a question for the jury as to the weight of the expert's testimony. It is clear that the determination of whether a witness has sufficient knowledge of the matter in question, so as to be qualified to give his opinion, is largely within the discretion of the trial court and will not ordinarily be disturbed on appeal unless clearly and prejudicially erroneous. *State v. M.M.*, 163 W.Va. 235, 256 S.E.2d 549 (1979); *Mollohan v. Black Rock Contracting, Inc.*, 235 S.E.2d 813 (W. Va. 1977).

The proper foundation for the admission of the expert testimony of Clarence E. Jones was properly laid by counsel for the Plaintiffs. (*See*, Trial Transcript 88-91). The circuit court granted counsel's motion to qualify Dr. Jones as an expert. (*See*, Trial Transcript 92). Although counsel for Potomac Edison objected to the qualification of this witness as an expert, the circuit court's ruling should not " . . . be disturbed on appeal unless clearly

and prejudicially erroneous." *Cox v. Galigher Motor Sales Co.*, 213 S.E.2d 475 (W. Va. 1975). Potomac Edison has failed to show that the trial court's decision with regard to the testimony of Dr. Jones as an expert witness and the subsequent admission thereof was in any way clearly and prejudicially erroneous.

7. The failure of the trial court to reduce the amount of damages awarded the plaintiffs by the jury because the plaintiffs failed to mitigate their damages is not grounds for awarding a new trial.

Defendant, Potomac Edison, alleges that the trial court erred in refusing to reduce the amount of damages awarded by the jury because Joe Helmick failed to mitigate his damages by not returning to work after the job at Hester Industries was completed.

In the instant case, Joe Helmick returned to work for Carl Belt after the accident, performing light duty chores, and ceased working when the job at Hester Industries was completed. He did seek other employment, but at the time of trial had not been able to secure employment. In *Gault v. Monongahela Power Co.*, 223 S.E.2d 421 (W. Va. 1976), Gault testified that, prior to the accident he had retired on a trial basis, but intended to return to work because his retirement earnings were not adequate to support he and his wife. Monongahela Power Company cited error in the trial court for allowing testimony of this nature, stating that such testimony was speculative. This Court held that a Plaintiff has a right to be compensated for impairment of his physical capacity and impairment of his ability to earn, regardless of whether or not he

intends to work. In this case, Joe Helmick's earning capacity has been impaired, and whether or not he can, or intends to return to work, is not the basis for reducing the amount of the jury's verdict or setting aside the verdict and awarding a new trial.

The jury, in reaching its verdict, heard the evidence and weighed the testimony of all witnesses, including expert witnesses regarding the economic loss Joe Helmick had suffered as a result of this accident. In West Virginia, an Appellate Court must not set aside a jury verdict upon the claims that it is excessive, "unless the verdict is monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption", quoting *Addair v. Majestic Petroleum Co.*, W.Va 105, 232 S.E.2d 821 (1977). See also *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791 (W.Va. 1986).

It is clear that the verdict arrived at by the jury was in accordance with the evidence adduced at the trial, and the verdict should stand.

8. This Defendant takes no position with the trial court's ruling in admitting the photographs of plaintiff's injuries.

This Defendant takes no position with regard to any error of the trial court in admitting the photographs taken by Plaintiff's treating physician of Plaintiff's wrist and hand inasmuch as it objected to their admission at the trial of this action on the basis of their inflammatory nature. Defendant, Potomac Edison, argues that the trial court erred in admitting these photographs, citing the

case of *Catlett v. MacQueen*, 375 S.E.2d 184 (W.Va. 1988), where this Court ruled that the Trial Court properly excluded photographs which were not used by a doctor to aid in his testimony.

While Potomac Edison argues that the photographs were improperly admitted into evidence, this Defendant will concede that this Court's position on the admission of photographs as evidence is becoming more liberal. Most recently this Court in *Roberts v. Stephens Clinic Hosp., Inc.*, supra, ruled that the admission of a "day in the life tape" was proper.

Although Dr. Caccucio did rely on these photographs during his testimony at the trial of this matter, Plaintiff testified that he had no pain in the areas depicted by the photographs and this testimony somewhat minimized the inflammatory nature of the photographs upon the jury.

9. The trial court did not err in refusing to grant defendant, Potomac Edison a new trial on the basis of alleged concealment of information by jurors.

Upon conducting a post-trial interview with members of the jury be an investigator, Potomac Edison allegedly discovered information which they believe warrants a new trial. Potomac Edison moved the trial court to grant them a new trial, basing the motion on grounds that two members of the jury were related by marriage and that one member's husband had been killed in an industrial accident. No proof of these facts was offered by Potomac Edison other than the affidavit of a non-juror whose source of information is not known. The trial court denied the Motion for a New Trial.

Case law and underlying policy support the trial court's decision. Attorneys are required to conduct a comprehensive and diligent pre-trial inquiry with regard to jury members. Failure to conduct pre-trial inquiry and to conduct meaningful voir dire does not entitle a party to a new trial. Accordingly, the trial court properly denied Potomac Edison's Motion for a New Trial.

Post-trial examination of the jurors allegedly revealed that two of the jurors were related by marriage and the third had lost her spouse in an industrial accident. Failure of Potomac Edison to conduct a pre-trial investigation of the jurors and failure to conduct meaningful voir dire does not constitute wilful or inadvertent failure to disclose relevant information, and is not grounds to set aside the jury verdict and award a new trial.

It has never been a practice in West Virginia to set aside a jury verdict on the basis of an attorney's failure to conduct meaningful voir dire. In *State v. Scotchel*, 285 S.E.2d 384 (W.Va. 1981), this Court ruled that a Defendant's assertion, after verdict was returned, that the juror had been prejudiced would not be well taken, since Defendant did not exercise due diligence on voir dire. This question has most recently been addressed in *State v. Hardway*, 385 S.E.2d 62 (W.Va. 1989), where this Court ruled that where a Defendant did not exercise reasonable diligence in ascertaining possible disqualification of juror on basis that juror was related to prosecutor's secretary and thus, was not denied fair trial through service of that juror because Defendant failed to ask questions which would determine whether any member of jury panel was closely related to prosecutor or member of his staff.

Potomac Edison inquired of the jury if they were related by blood or marriage to a shareholder of Carl Belt, Incorporated, an employee of Carl Belt, Incorporated, a shareholder of Potomac Edison Company, an employee of Potomac Edison Company, but failed to inquire if any of the jurors were related to each other.

As to the juror who failed to disclose that her husband was killed in an industrial accident, she was not asked to reveal this information on voir dire. Attorney for Potomac Edison conducted the following voir dire in addition to that of the Court:

> Question: Has any member of the panel or his or her relatives, either by blood or marriage, or friends, been involved in any lawsuit, criminal or civil, involving alleged personal injuries? Or has any of you made a claim or had a claim made against you for damages or monies as a result of personal injuries?
>
> Jury: No response.
>
> Question: If any member of the jury panel answers the Question 12 in the affirmative, we'll have to go through that.
>
> Jury: No response.
>
> Question: Has any member of the panel been a victim of or had a relative or friend who has lost a limb or become *permanently or partially disabled* in any manner whatsoever?
>
> Jury: No response.
>
> Voir Dire Transcript, p. 10

It is clear that this juror would have not been required to respond affirmatively to Potomac Edison's

voir dire inquiries because he did not describe her particular set of circumstances. Neither the juror nor husband was involved in a lawsuit claiming of personal injuries, her husband did not lose a limb, was not permanently or partially disabled, but was killed. This Court has held that there was no connection between the alleged fact that some of the jurors had lost relatives by automobile accidents and the qualification of individual jurors who hear the case. *Utt v. Herold*, 127 W.Va. 719, 34 S.E.2d 357 (1945).

If Potomac Edison had engaged in a pre-trial inquiry of the jurors on the jury list rather than a post-trial inquiry, relevant information about these jurors could have been ascertained before the jury was chosen. Biographical information was provided to the parties by the Circuit Court and it is not violative of any West Virginia law for a party to conduct a discreet, pre-trial inquiry. Pre-trial inquiry would have given Potomac Edison an opportunity to prepare and utilize a more meaningful voir dire and if it could not get the jurors struck for cause, it could have used its preemptory strikes to bar these jurors from sitting on the jury.

In *Wagoner v. Iaeger*, 49 WV 61, 38 S.E. 2d 528 (1901), the Supreme Court ruled that a verdict will not be disturbed because of challenge against a juror, grounds for which might have been discovered by exercise of ordinary diligence and that failure to exercise such diligence is equivalent to a waiver of the challenge. In the case of *Garrett v. Patton*, 81 W.Va. 771 (1918), the Supreme Court found that in order that the disqualification of a juror may be made ground for setting aside a verdict, it must be made to appear by the party making the motion that

he did not know of, and could not have discovered by the use of reasonable diligence, such disqualification before the jury was sworn. (Emphasis added.) Failure by Potomac Edison to use reasonable diligence before trial to ascertain facts about the jury and to conduct meaningful voir dire does not warrant a post-trial inquiry to glean information about the jurors for the purposes of securing a new trial.

The post-trial inquiry of the jurors by Potomac Edison was improper. The Court advised the jurors not to discuss the case after they rendered their verdict and were excused.

The Voir Dire Transcript, at p. 24 reads:

> The Court then thanked the jury for their service in the case and excused them from further service in this case. He also informed them at this time that they did not need to talk with anyone about the case, etc.

In *Roberts v. Stephens Clinic Hosp., Inc.*, 345 S.E.2d 791 (W.Va. 1986), this Court ruled that parties may not engage in posttrial, collateral attack upon jury's integrity in absence of showing of corruption or bias. *Haight v. Goin*, 346 S.E.2d 353 (W.Va. 1986) also provides that a juror should not discuss the case with anyone outside the jury room.

Further, Potomac Edison did not secure affidavits from the jurors, but rather tendered the affidavit of a non-juror, believed to be an employee of Potomac Edison's counsel, based upon discussions between the affiant and the individual jurors. Affidavits of Jurors are inadmissible to impeach their own verdict. The affidavit of a non-

juror is hearsay and is not the proper vehicle under which a jury verdict may be set aside. See *Miller v. Blue Ridge Transp. Co.*, 15 S.E.2d 400 (W.Va. 1941); *Utt v. Herold*, 34 S.E.2d 357 (W.Va. 1945).

This information about the jurors was not revealed to the Court and the other parties until some nine (9) months after the verdict was entered, at which time Potomac Edison filed a Motion to Set Aside the Jury Verdict under Rule 60(b) of the West Virginia Rules of Civil Procedure on the basis of newly acquired evidence. Even if it were proper for to engage in a post-trial inquiry of the jurors, the Court did not err in refusing to set aside the jury verdict. Rule 60(b) of the West Virginia Rules of Civil Procedure limits the time for Motions filed on newly acquired evidence strictly to eight (8) months from the date of the judgment order, which was filed on July 26, 1990, a period of more than eight months prior to April 27, 1990. This issue has recently been addressed by the Court in the case of *Savas v. Savas*, 382 S.E.2d 510 (W.Va. 1989), and this Court strictly interpreted Rule 60(b) and ruled that a party seeking relief from final judgment on ground of mistake, surprise, excusable neglect, or unavoidable cause, newly discovered evidence, fraud, misrepresentation or misconduct, or for any other reason justifying relief must seek relief within reasonable time, but in any case not more than eight months after the judgment order was entered.

There was no bias of any juror in the instant case. Potomac Edison failed to conduct a diligent investigation of the jurors before the jury was sworn and did not conduct a meaningful voir dire. As there was no error in

the Trial Court with regard to the jury being chosen, the verdict must stand.

V. PRAYER

WHEREFORE, the Defendant, Hester Industries, opposes Defendant, Potomac Edison's request for Appeal and respectfully requests that this Honorable Court let stand the verdict and judgment of the Circuit Court of Hardy County.

Respectfully submitted,

Defendant Hester Industries
By counsel

(4)

No. 91-265

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

POTOMAC EDISON COMPANY,
Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK,
and CARL BELT, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF IN OPPOSITION BY CARL BELT, INC.

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STATEMENT OF THE CASE

The Petition arises from a civil tort dispute for personal injuries caused by electrical burns. Petitioner, Potomac Edison Company, the supplier of a dangerous instrumentality under West Virginia law, was held liable to Mr. & Mrs. Joe Helmick for negligently failing to secure and make safe a utility pole which was in the path of work being performed by Mr. Helmick for his employer, Carl Belt, Inc.

This Respondent paid workers' compensation benefits in the amount of $53,760.00 to Mr. Helmick, pursuant to the West Virginia workers' compensation scheme. Carl Belt, Inc. was then initially named as a defendant in a civil case filed by the Helmicks, under West Virginia's limited exception to the exclusive remedy/employer immunity doctrines which allows an employee to obtain recovery over and above the statutory compensation if the employer acted with deliberate intention to expose him to a hazard. Potomac Edison asserted a cross-claim against Respondent on similar grounds.

Ultimately, the Helmicks' claims against Carl Belt, Inc. were dismissed before trial. The trial Judge also directed a verdict against Potomac Edison on its crossclaim against Carl Belt, Inc.

The jury then returned a verdict in favor of the Helmicks in the amount of $498,232.84, to which was added prejudgment interest. The jury determined that Potomac Edison was 40% responsible for the injuries and that Carl Belt was 60% liable, even though this Respondent was not permitted to argue its position before the jury. By operation of West Virginia's compensation statute, Potomac Edison, as the third-party wrongdoer, was held solely responsible for the verdict. The judgment was affirmed, in its entirety, by the West Virginia Supreme Court of Appeals on June 27, 1991.

Now, Petitioner asks this Court to federalize the West Virginia tort and workers' compensation systems by directing that the prohibition against contribution by a workers' compensation paying employer be abolished because the confluence of statutory and common law doctrines, as applied here, is purportedly arbitrary and capricious in violation of due process and equal protection guarantees.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SIGNIFICANT FEDERAL INTEREST IN DICTATING TO WEST VIRGINIA THE CONTENT OF ITS TORT LAW

For more than 70 years, this Court has upheld ". . . the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee." *New York Central Railroad v. White*, 243 U.S. 188, 200 (1917). Indeed, this Court long ago held that a third party wrongdoer, obligated to indemnify an employer or the insurer of the employer by virtue of the provisions of an applicable workers compensation statute, was not unconstitutionally deprived of property. *Staten Island Railroad v. Phoenix Company*, 281 U.S. 98 (1930). In short, the propriety of each of the several states developing rules governing compensation for injured workers is manifest and well-settled.

The only Constitutional limitation on the ability of the states to evolve their own tort laws and workers compensation systems free from federal intervention is the prohibition against "wholly arbitrary or irrational" results. *Martinez v. California*, 444 U.S. 227, 282 (1980). Stated otherwise, a state can regulate the rights and liabilities of its citizens "in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). This follows from the fact that the Fourteenth Amendment does not obligate the states to adopt specific doctrines or reforms. *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921).

Contrary to Petitioner's ambiguous and conclusory arguments concerning the unfairness of the particular judgment in this case, the confluence of tort doctrines and

workers' compensation remedies under West Virginia law is neither arbitrary nor irrational as applied to a third-party wrongdoer. West Virginia's laws are designed to preserve and foster legitimate state interests.

West Virginia has embraced the majority rationale for the employer's immunity from tort liability as a fundamental policy underpinning for its workers' compensation system. In *Crawford v. Parsons*, 141 W. Va. 752, 92 S.E.2d 913 (1956) the West Virginia Supreme Court of Appeals quoted Professor Larson as follows:

> The reason for the employer's immunity is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common-law verdicts. *Id.* at 759 (*quoting* 2 Larson, Workmen's Compensation, § 72.20.)

A necessary corrollary to an employer's immunity in tort is the prohibition against claims for contribution or identification asserted by third-party wrongdoers. Acceptance of Petitioner's arguments would allow recovery against the employer based upon negligence and, thereby, totally eviscerate the workers' compensation scheme in West Virgina by subjecting employers to *per se* statutory responsibility *and* tort liability. Such an inherently contradictory approach would dramatically alter the *quid pro quo* balance. The limitation of liability is, therefore, neither arbitrary nor irrational since it serves the laudable and rational goal of ensuring prompt and definite payments for injuries sustained in the workplace. Thus, there is no due process or equal protection issue presented in the Petition.

II. THIS COURT HAS PREVIOUSLY REJECTED SIMILAR ATTACKS ON COMPARABLE WORKERS' COMPENSATION PROVISIONS

Purported instances of similarly unfair results have previously been raised under the Federal workers' compensation scheme. For example, a doctrine has developed under the Longshoremen and Harbor Workers' Compensation Act that, in the case of a latent disease, the employer with the last injurious exposure is held responsible for all compensation benefits. In a hypothetical situation, an employee exposed to asbestos fibers throughout his work life can obtain compensation benefits from his last employer even though that employment relationship may have existed for only a matter of months. *See Traveler's Insurance Company v. Cardella*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir.), *cert. denied*, 440 U.S. 91 (1978). Yet, this result has never been overturned on due process or equal protection grounds in this Court.

This Court has consistently upheld the broad purpose of workers' compensation legislation to eliminate to the employee, as well as to third-parties, any recourse against the employer for negligence inasmuch as the workers' compensation system provides statutory benefits irrespective of fault and is, therefore, not a tort mechanism for fixing damages. *See Mahnick v. Southern S/S Co.*, 321 U.S. 96 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Ryan Stevedore Co., Inc. v. Pan-Atlantic S/S Co.*, 350 U.S. 124 (1956). Indeed, it is the majority rule that a third-party wrongdoer cannot sue a negligent employer as a joint tortfeasor under concepts of either contribution or indemnity. *See* 2B Larson, *The Law Of Workmen's Compensation*, § 76.20 at 14.654 (1989). The West Virginia system is manifestly consistent with this majority rule by prohibiting contribution against a compensation paying employer.

The prohibition against contribution also serves definite and valuable policy interest. The employer has an absolute liability to injured employees, irrespective of fault. In exchange for giving up negligence defenses, the employer is provided immunity from claims beyond the statutory workers' compensation requirements. Even where states have adopted comparative negligence, there has been no dramatic change in this exclusive remedy rule. *See id.*, § 76.20 at 14-685. Since the employer is not liable in tort to its employee, the employer can never be a joint tortfeasor. Therefore, there is no reasonable basis for contribution or indemnification.

III. THE ISSUE OF EMPLOYER IMMUNITY FROM THIRD-PARTY CLAIMS SHOULD BE LEFT TO THE STATES FOR DEVELOPMENT

Certain particular cases may appear to lead to unfair results. However, as Petitioner recognizes, the issues implicated here require policy judgments which are best and properly left to the States for development. The States should be allowed to establish, as a matter of policy, the ". . . relative weight given to three competing values: stability, equity and simplicity." *Id.* Section 76.92 at 14-886. West Virginia has properly opted for stability and simplicity in its system of compensating injured workers and allowing recovery against third-party wrongdoers. This is the course of action taken by most courts and is entirely deserving of respect.

In more than 70 years since workers compensation laws were first enacted in the United States, only two State Supreme Courts have questioned, on the constitutional grounds, the exclusive remedy/employer immunity doctrine. The decisions in *Sunspan Engineering and Construction Company v. Springlock Scaffolding Company*, 310 So.2d 4 (Fla. 1975) and *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974) are aberrant determinations with little substantive analysis and, certainly, no

persuasive rationale which could support the intervention by compensation laws in the State of West Virginia.

CONCLUSION

Accordingly, there is no basis for this Court to grant the pending Petition. The tort and workers' compensation regimes evolving in West Virginia are based upon policies which are rationally related to appropriate state interests. There are no fundamental Constitutional rights implicated in this case. The several States have the authority to create and regulate the systems whereby private disputants are assigned monetary responsibility for wrongful conduct. Society has a minimal concern with the outcome of this case in which the ultimate result sought by the Petitioner is a reduction in a damages award and the federalizing of State tort and compensation laws.

Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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